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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

RAYMOND G. KUNTZ
KUNTZ & SPLETZER, P.C.
Attorney for Petitioner Board of Education
Hunting Ridge Mall
Bedford Village, NY 10506
(914) 234-6363

TERESA KIERNAN KUNTZ
Of Counsel

MICHAEL A. CHATOFF
Attorney for Respondents
270-31M Grand Central Parkway
Floral Park, New York 11005
(212) 428-4596 (TTY)
(516) 248-1900

ROBERT D. STONE
Deputy Commissioner for Legal Affairs
Attorney for Petitioner Commissioner of Education
State Education Bldg.
Albany, New York 12234
(518) 474-6150

JEAN M. COON
PAUL E. SHERMAN, JR.
DONALD O. MESERVE
Of Counsel

PETITION FOR CERTIORARI FILED DECEMBER 15, 1980

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DOCKET ENTRIES-UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK - 79 Civ. 2139

4-24-79 1. Fld complaint. Issued summons.

5-15-79 2. Filed Summs with Marshal's return: Board of Education of the Hedrick Huson Central C.V. Eible 5-8-79

5-31-79 3. Filed Pltffs' request for a hearing re: additional evidence.

5-31-79 4. Filed Pltffs' amendedment to complt.

5-31-79 5. Filed Pltffs' combined interrogs and reques for production of documents.

7-3-79 6. Filed pltffs affirmation & ex parte motion for an order purs to Rule 6(d) providing that the motion of the deft dtd 6-18-79 shall

be submitted on Friday June 29, 1979

7-3-79 7. Filed mrmoradum of alw on behlaf of pltff

7-3-79 8. Filed pltffs affirmation in opposition to defts motion to dismiss

7-3-79 9. Filed DEft Hendrick Hudson School District affirmation & notice of motion purs to Local Rule 9(b) & Gen Rule 12 (B) to dismiss for lack of jurisdiction

7-3-79 10. Filed memorandum of law on behalf of defts

7-5-79 11. Filed defts answers to -nterrog's

7-13-79 12. Filed Pltffs; affdvt & Notice of motion for an order compelling party to

answer inter and the imposition of sanctions for failure to provide inspection of documents. Ret: 7-20-79.

7-31-79 13. Filed Pltff's reply affirmation by Michael A. Chatoff/

7-31-79 14. Filed Deft's affirmation in response to motion to compel answers to interrogs.

7-31-79 15. Filed duplicate original of Memorandum & Order of Magistrate Re: Pltff's motion is Accordingly denied in all respects. So Order Raby, Magistrate.

8-15-79 16. Filed pltff's notice of motion for an order for a

prel. inj. REt: 8-17-79.

8-15-79 17. Filed Pltfs' memo of law in support motion for a prel. inj.

8-23-79 18. Filed Order that the deft's motion to dismiss is denied..So Ordered Broderick, J.m/.n pltff to file an amended complaint within 10 days

8-24-79 19. Filed Plntffs' interrogs.

9-4-79 20. Fld Deft's Affidavit in opposition to pltff's Motion for prel. ing

9-4-79 21. Fld Deft's Memorandum in opposition to pltff;s Motion

9-4-79 22. Fld pltffs affirmation re responsibility for any detriment to pltffs

education.

9-5-79 23. Fld pltffs AMENDED COMPLAINT.

9-6-79 24. Filed Pltff's affdvt of service of papers indicated...on the defts on 9-4-79.

9-25-79 25. Fld The Video Taped deposition of McCay Vernon taken on 9-19-79

9-26-79 26. Fld Pltff's Notice of aking depoition of McCay Ernon

9-26-79 ---Hearing held on motion for prel. inj. before Judge Broderick.

9-27-79 ---Hearing cont'd.

9-28-79 ---Hearing cont'd.

10-4-79 ---Hearing cont'd and concluded. It is Stipulated between parties that the

hearing on prel. inj. will tkae the place of a trial. "Decision Reserved." All briefs due on 10-19-79. Reply briefs by 10-24-79.

10-5-79 27. Filed ANSWER of Deft. Ambach.

10-5-79 28. Filed ANSWER of deft. Bd. of Educa. of the H. Hudson Cntrl School District.

10-23-79 29. Filed Memorandum on behalf of deft. Gordon M. Ambach.

10-23-79 30. Filed Brief on behalf of deft. School District.

11-8-79 31. Filed Pltff's reply brief.

11-13-79 32. Filed Pltff's notice to take deposition of McCay Vernon on 9-19-79.

11-15-79 33. Filed request to clerk for entry of default.

1-2-79 34. Filed Order/ Accordingly, the deicsion of the Commisioner of Ed. dtd 4-10-79, is reversed and it is hereby ordered that the defts provide the pltff with service of a certified interpreter for te deaf during any school period in which academi subjects are taught. Broderick, J.m/n Judgment entered 1-21-80. Clerk mn

1-16-80 35. Filed Deft. Hendrick Hudson's Amended answer.

1-16-80 36. Filed deft. Board of Ed's response to interrogs.

1-16-80 37. Filed Pltff's proposed findings of fact.

1-16-80 38. Filed deft. Board of Ed's trial memorandum on motion for prel.inj.

1-1780 39. Filed Memorandum Order=For the reasons which follow, I deny the deft. Commissioner's motion and grant the pltff's motion...So Ordered Broderick, Jm/n

1-17-80 40. Fld Opinion #49563.....etc.....Fot the reasons which follow, I find that the pltffs have established by a preponderence of the evidence Amy's right toa sign Language interpreter in the classroom....etc..... Broderick, J.mn

1-25-80 41. Filed NOtice of appeal

to the U.S.C.A. by the defts from theorders entered on 1-2-80 and 1-17-80. m/n to Michael A. Chatoff.

1-25-80 42. Filed Undertaking on appeal bond in the asum of $250.00 by the Aetna Casualty and Surety Co.

1-25-80 43. Filed Transcript information form D - Transcript being ordered.

2-13-80 44. Filed Pltff's O.S.C. for an order appointing Robert Manley to retain a certified interpreter for the deaf who will interpret for Amy Rowley...ret: 2-13-80 Broderick, J.

2-14-80 45. Filed Order that defts' cross motion for a stay pending appeal of this

court's order of 12-28-79 are herebydenied...Broderick J.m/n.

2-21-80 46. Filed Notice to the docket clerk that the original record on appeal is certified and transmitted to the U.S.C.A.

2-27-80 47. Filed true copy of order form the U.S.C.A. that the motion made by the appellant dtd 2-15-80 for a stay pending appeal is granted.

3-17-80 48. Filed transcript of record of proceedings dsated, 9-26,27,28 & 10-5-79.

3-17-80 49. Filed notice to the docket clerk that the 1st supplemental record has been

certified and transmitted to the U.S.C.A.

3-18-80 50. Filed Certification re: documents that are part of record of appeal to the U.S.C.A....Broderick, J.

3-31-80 51. Filed deft's designation of exhibits to USCA.

3-31-80 52. Filed Notice to the docket clerk that the 1st supplemental record has been certified and transmitted to the U.S.C.A.

4-24-80 53. Filed pltff's cross-designation of exhibits to be included as part of the record on appeal.

4-24-80 54. Fld Notice to the Clker that the 3rd supplemental

record on appeal has been Certified & transmitt to the 3rd supplemental record on appeal

9-16-80 55. Filed true copy of order from the U.S.C.A. that the motion by the appellees to vacate stay dtd 2-19-80..is hereby granted. m/n

9-17-80 56. Filed pltffs' OSC for an order appointing R. Manley to retain a certified interpreter for the deaf...ret: 9-22-80...Broderick, J.

9-24-80 57. Filed deft. Hendrick's affirmation in opposition to the O.S.C.

9-24-80 58. Filed deft. Hendrick's affirmation in opposition to

	the O.S.C.
9-25-80	59. Filed Order that pltff's motion to appoint Mr. Maley as interpreter for the deaf. is denied...w/out prej..So Ordered Broderick,J.m/n
10-1-80	60. Filed true copy of order from the U.S.C.A. that the judgment of the District Court is affirmed in accordance with the opinion of this court..Judgment entered 10-1-80..Clerkmn/Docketed as Judgment#81,0080 on 1-26-81
1-5-81	61. 9-22-80
1-26-81	62. Fld Memo-end on the Bottom of a letter to Judge Broderick from Kuntz & Spetzer dtd

	1-21-81...Application granted. The return date for the OSC is adjourned to 2-13-81 at 2:30 pm..etc....so Ordered....Broderick, J.mn
1-30-81	63. Fld Pltff's OSC for an order directing defts, school district to provide a sign language interpreter...ret: 1-23-81...Broderick, J.
2-17-81	---Fld memo-end of on the back of document #63.....Withdrawn on consnt after conference...Braderick, J.mn

DOCKET ENTRIES-UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT: 80-7098

1-31-80	Copies of district court docket entries and notice of appeal on behalf of The Bd. of Ed. Hendrick Hudson & ano. filed
1-31-80	Copy of receipt for payment of docket fee filed
1-31-80	Form C on behalf of The Bd. of Education etc. ental. filed
1-31-80	Form D on behalf of The Bd. of Education etc. et.al. filed
1-31-80	Court Reporter copy of form D filed
2-4-80	Scheduling order No. 1 filed, PC, CAMP
2-15-80	Appellant Board of Education of Hendrick Hudson motion

for stay, pfs filed

2-19-80 Appellee Rowley affidavit in opposition to motion for stay, pfs filed

2-19-80 Appellee Rowley memorandum of law in opposition to motion for stay, pfs filed

2-19-80 Order granting Stay filed

2-19-80 Certified copy of order granting stay issued to dist. court

2-21-80 Record on appeal filed (original papers of district court)

2-28-80 Appellant Bd of Ed. Hendrick Hudson motion for extension of time to file brief and appendix, pfs. filed (Order endorsed: 2-29-80 granted)

3-3-80 Appellees Rowley affirmation in opposition to motion for

ext. time pfs. filed

3-6-80 Appellee Rowley motion for reconsideration and vacation of extension of time, order for expedited appeal and imposition of sanctions pfs. filed (Order endorsed;3-12-80 DENIED)

3-12-80 Appellants Hendrick Hudson etc. affirmation in opposition to motion for reconsideration of order extending time etc. pfs. filed

3-18-80 First supplemental record on appeal filed (original papers of D.C.)

3-19-80 Order that court's order of 3-12-80 with respect to appellee's motion of 3-17-80 is amended by adding

that motion of 3-16-80 is otherwise denied. filed

3-24-80 Appellant Commissioner Bd. of Ed. brief filed, pfs

3-24-80 Appellant Hendrick Hudson central School Dist. brief filed, pfs

3-24-80 Appellants The Bds. of Ed., etc. appendix filed, pfs

3-24-80 Appellants The Bd. of Ed., etc. transcript vol. viled, pfs (4cc)

3-24-80 Appellants The Bd. of Ed., etc. exhibits vol. filed, pfs (4cc)

3-24-80 Amicus brief NYS School Boards Asson. filed (by consent) in support of appellants Hendrick Hudson, etc.

3-31-80 Second supplemental record

on appeal filed

4-21-80 Appellee Rowley brief, pfs. filed

4-21-80 National Assoc. of the Deaf amicus brief in support of appellee Rowley, by consent, pfs, filed

4-24-80 Appellees Rowley motion for permission to transcribe oral argument by tape-recording, pfs, filed (Order endorsed:4-28-80 granted) WRM

4-28-80 Appellants Hendrick Hudson reply brief, pfs. filed

4-28-80 Third Supplemental record filed (original papers of dist, court)

4-30-80 Order granting leave to file a reply brief on behalf of NYS School Bd. Assn. as

	amicus curiae filed (WRM)
4-30-80	Reply brief on behalf of NYS Schoold Bd Asson. as amicus curiae filed
5-1-80	Case argued before: Mansfield, Timbers, CJJ, Bonsal, DJ
7-17-80	Judgment affirmed, published opinion, Per Curiam
7-17-80	Dissenting, published opinion, Mansfield
7-17-80	Judgment filed
7-17-80	Transcript of oral argument of 5-1-80 filed
7-24-80	Appellee Rowley itemized and verified bill of costs filed, pfs.
7-31-80	Appellants Hendrick Hudson & ano. petition for rehearing, pfs. filed
7-31-80	Appellants Hendrick Hudson &

ano. petition for rehearing en banc pfs. filed

8-14-80 Appellee Rowley motion to vacate stay granted 2-19-80, pfs. filed

8-21-80 Appellants Hendrick Hudson answering affirmation in opposition to motion to vacate the stay, pfs. filed

9-4-80 Order granting vacation of stay of this court dated 2-19-80 filed (WRM, WHM, Cjj, Bonsal, DJ)

9-8-80 Certified copy of order vacating stay issued to district court

9-17-80 Order denying petition for rehearing filed

9-17-80 Order denying petition for rehearing en banc filed.

9-24-80 Mandate issued (opinion and

judgment)

10-1-80 Mandate receipt received

10-24-80 Certified copy of statement of cost issued to district court under covering letter

12-9-80 DUPLICATE MANDATE issued (Judgment)

12-29-80 Notice of filing petition for certiorari with supreme court filed (SC#80-1002)

1-24-81 Record on appeal, first second and third supplemental records returned to district court.

3-19-81 Receipt of return of records filed.

TRANSCRIPT OF HEARING BEFORE
THE IMPARTIAL HEARING OFFICER
DECEMBER 20, 1978

----------X

In the Matter of

AMY ROWLEY

----------X

Hendrick Hudson School District
61 Trolley Road
Montrose, New York
December 20, 1978
10:45 a.m.

BEFORE: ALBERT P. ROBERTS, Hearing Officer

APPEARANCES: KUNTZ, LEWIS & SPLETZER, P.C.
Attorneys for the School District
21 Davis Avenue
Box 3330
Poughkeepsie, New York 12603
BY: RAYMOND G. KUNTZ, ESQ.

MICHAEL A. CHATOFF, ESQ.
Attorney for the Petitioner
192-05 Radnor Road
Jamaica, New York 11423

ALSO PRESENT: ANITA POLK, Interpreter
27 Lenox Avenue
White Plains, New York

MARY SHEIE, Interpreter

JAMES RAUKOHL

Maureen M. McCaffery, R.P.R.

MICHAEL CHATOFF-INTRODUCTORY REMARKS[6]

MR. CHATOFF: There are two matters that will be considered at this hearing. First, Mr. and Mrs. Rowley have requested an independent educational evaluation. According to the regulations of the commissioner, that evaluation must be at District expense unless the hearing examiner determines that the recommendation of the Committee on the Handicapped is appropriate.

Secondly, the more substantive issue, the hearing examiner must determine whether the recommendation of the Committee on the Handicapped is correct.

The evidence and my closing statement will show that the Committee on the Handicapped applied an inappropriate standard in its determination of the proper services

to be provided for Amy Rowley; that the Committee on the Handicapped misrepresented, misinterpreted the regulations of the Commissioner of Education and that the Committee defaulted in its obligations under a very important section of those regulations.

THE INTERPRETER: Does she just say yes?

MR. ROBERTS: I didn't understand that.

THE INTERPRETER: Yes, she promises to tell the truth.

MR. ROBERTS: Proceed, Mr. Chatoff.

DIRECT EXAMINATION

BY MR. CHATOFF:

Q First I want to know what Mrs. Rowley's profession is?

A My profession is a certified teacher of the deaf, National Certification of the American Director of the Deaf.

[18]

Q Is Amy Rowley your daughter?

A Yes, she is my daughter.

Q She is deaf, is she not?

A Yes, she's deaf.

Q When you discovered that she was deaf, too, how did you begin training her?

A I use the total communication approach.

Q Why do you favor total communication?

A Because I am deaf myself, and I have used that in my profession.

Q Are you a good lip reader?

MR. KUNTZ: I object to that question.

A I would say yes.

MR. ROBERTS: What is the nature of your objection?

MR. KUNTZ: I don't know what relevancy, whether Mrs. Rowley is a good lip reader, has to this hearing.

MR. CHATOFF: I will get to that right now.

MR. KUNTZ: I withdraw the objection.

Q At this hearing, can you, Mrs. Rowley, understand what is going on by looking at the people

[19]

who are talking or must you follow the interpreter who is using total communication?

A I must follow the interpreter using total communication.

Q I think it's important to forget about individual questions. Explain to us why you want Amy to be taught in the total communication method.

A So that she will be able to get the equal opportunity like hearing people.

Q I would like you to read part of the affidavit of Taras Denis,

from the second paragraph.

MR. KUNTZ: I'd object. I think the affidavit speaks for itself. I don't know why Mrs. Rowley has to read it.

MR. ROBERTS: I have to sustain that.

Q First we will establish the basis. Do you know Taras Denis?

A Yes, I know him.

Q How long have you known Taras Denis?

A Fourteen years.

Q Does he know Amy?

A Yes, he knows Amy.

Q Have you discussed Amy's education with Taras?

A Yes.

Q Was he present at the Committee on the Handicapped meeting on September 12th?

A Yes.

MR. CHATOFF: Is there now a basis for reading Mr. Denis's affidavit into the record? It will appear as part of the record under any circumstances. Would it be appropriate to have Mrs. Rowley read it?

MR. ROBERTS: Are you addressing the question to me, Mr. Chatoff?

MR. KUNTZ: I withdraw my objection. If he wants to have her read it, he may proceed.

MR. ROBERTS: It's already in evidence.

A "It now appears that the Hendrick Hudson School board is taking an adversary position by refusing to assist Mr. and Mrs. Rowley in the overall development of their deaf

child, despite the demonstrated cooperation of the parents and the unanimous support of authorities familiar in the field. In effect, the school board is assuming a very grave risk -- including possible irreversible damage to both career and personality of a child as

[21]

bright as Amy -- in denying what is due her under Public Law 94-142".

MR. CHATOFF: I think that's all the questions I have. You may cross-examine.

MR. KUNTZ: I have no questions on cross-examination at this time.

(Whereupon, the witness was excused and withdrew.)

MR. CHATOFF: As my next witness, I would like to call Mr. Clifford Rowley.

CLIFFORD ROWLEY - TESTIMONY [22]

DIRECT EXAMINATION

BY MR. CHATOFF:

Q What is your profession?

THE INTERPRETER: I'm a research chemist.

Q Is Amy Rowley your daughter?

THE INTERPRETER: Yes.

Q When you discovered that she was deaf, how did you train her?

THE INTERPRETER: When I realized she had hearing problems, we used what we had learned by using a method called total communication, all lip reading, hearing, everything, that she be able to understand.

MR. CHATOFF: I think that is sufficient right now. Do you wish to cross?

MR. KUNTZ: I have no cross-examination, thank you.

MARY SHEIE - TESTIMONY [24]

DIRECT EXAMINATION

BY MR. CHATOFF:

Q What is your profession?

A My profession is I am a certified teacher of the deaf, certified interpreter for the deaf and a teacher of sign language.

Q Do you favor the use of total communication in the education of deaf children?

A Yes, I do.

Q Are you familiar with Doctor Robert R. Davila?

A Yes, I am.

Q Have you read any portion of the affidavit submitted by Doctor Davila in this case?

A Yes, I have.

Q Do you agree with the statement that, "The average person speaks one hundred twenty words a

minute. Of these, fifty percent are visible and of

[25]

these fifty percent, we can see only three fourths of the movement due to the rapidity of speech -- thirteen sound movements per second. The eyes can consciously see eight or nine or at best ten. Many speech sounds are obscure and barely visible. In general, fifty percent of all speech sounds are hidden". Do you agree with that?

MR. KUNTZ: I'd object to the question on the grounds that it calls for testimony by this witness which should stem from some foundation based upon her expertise rather than to comment upon information or testimony already produced in the record.

I have no objection to her testifying as to what she knows, but to have her comment upon some other form of testimony or affidavit leaves us in a very difficult position to ask her questions about her own views.

MR. ROBERTS: Sustained.

MR. CHATOFF: Do you wish additional documentation of the witness' experience?

MR. KUNTZ: No, I'd simply suggest that she be allowed to testify from her own knowledge and from the facts that she knows.

Q When a deaf child uses oralism only, lip [26] reading, can the deaf child understand everything that is spoken?

A Not everything, no.

Q In a situation where a deaf child does not understand everything

that is spoken, what are the options available to the child?

A The options available, when not everything is understood, are to be placed in a total communication situation which would include a person, interpreter or teacher who is capable of communicating as close to one hundred percent of the information as possible.

Q I had in mind something else. If a deaf child uses lip reading only and misunderstands or does not understand some or all of what is said, do deaf people, on occasion, say, "Yes, I understand," even when they don't understand?

A Yes, it has been my experience that with deaf people --

Q Or might a deaf child ask a person to repeat a statement that he

has not understood?

A It is more common for the deaf child to simply nod his head in agreement than to say that they do not understand.

Q If I can refer to just one additional [27]

statement in Doctor Davila's statement that, "The sensitive teacher may repeat what has been said for the deaf student which becomes frustrating for the rest of the class." Would you agree with that?

A Yes, I would.

Q If an interpreter were used for a deaf child, a deaf child who is familiar with total communication, would there be any need for the teacher to repeat for the child?

A Not as often.

MR. CHATOFF: I have no further questions. You may cross.

CROSS EXAMINATION

BY MR. KUNTZ:

Q Mrs. Sheie, have you observed Amy in the Furnace Woods School?

A No, I have not.

MR. KUNTZ: I have no further questions.

MARIANNE PAPPAS - TESTIMONY [140]

DIRECT EXAMINATION

BY MR. KUNTZ:

Q By whom are you employed?

A Hendrick Hudson School District.

Q In what capacity?

A Resource teacher, certified in special education.

Q Are you a member of the Committee on the Handicapped?

A Yes, I am.

Q As part of the committee's evaluation of the Amy Rowley matter, did you undertake certain activity on behalf of the committee?

A Yes.

Q What did you do?

A I observed Amy in the classroom for one morning.

Q Would you tell the hearing officer of

your observations and conclusions that you drew from those observations?

A Yes. I observed Amy in her first grade classroom functioning in a variety of situations; academic, social, working in large group, small group, working individually, working in highly structured format, working informally, where optimum performance was expected and where the child was to set her own goals.

The first activity I observed, the children were in a small group. It was a cut and color type of activity where they had to follow the directions of the teacher. Amy watched what the teacher did as well as what the teacher said.

The teacher at this point had the Earmark microphone on and Amy

was tuned in. When Amy had her back to the teacher and the teacher spoke to her, she would immediately turn around to watch the teacher again.

At the end of this activity she went to her desk to complete a work book page independently. She appeared very comfortable in this independent setting. She required no help to complete the page. In fact, she offered help to other children who could not complete the page independently.

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I found that her interaction with other children while they were at their seats was absolutely beautiful. It was a real give and take atmosphere which you would like to find in a typical first grade classroom.

The third activity which I observed she was helping a boy put some puzzles together. She was very quick at finding the pieces. Her social interaction here was beautiful. She stuck to the task well. She watched the other child to see what he was saying and what he was doing. I would say there was perfect communication between Amy and the other child with whom she was working.

At one point Amy was very engrossed in putting together her puzzle, and the boy said to Amy, "Let's do this one next," and Amy was not looking at him, and he said again, "Let's do this one next," and she still was engrossed in her puzzle, so he tapped Amy on the knee, and he said, "Let's do this one next," and she said, "Okay", and I never saw that

he was impatient with her or that there was anything in a negative nature, but that he was able to communicate with Amy and she with him.

MR. ROBERTS: Could you locate the time frame?

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THE WITNESS: Yes, this was the end of September.

MR. ROBERTS: Of what year?

THE WITNESS: Of this year in first grade.

A She seemed very happy at the completion of her task and she decided that now that we're all through, we'll all go see the turtle. They have a turtle inside on display, where she joined a group of other children. She joined them for some social activity.

The fourth activity she was playing store with a girl and they

both thoroughly enjoyed the game. Amy was the clerk and the girl was going to buy something at the store. When the girl finally left that group situation, I asked if I could play store with her, and she said yes and we started playing store together, and I found it a very delightful experience in that I have not -- I do not know how to sign.

I have not had any experience in working with deaf people before, yet she seemed to understand exactly what I was saying. She decided she would sell me anything I wanted to buy in that store and this was very good indication of her bright

[144]

imagination and creativity.

She asked if I wanted to buy some ketchup or if I wanted potato

chips, and I would say yes and how much are they and she would tell me the price, and I would give her the money and she would give me my change.

At the end of the time when this informal acting was going on, the teacher called the children back for a large group instruction situation and not knowing that Amy knew that she had to go back at this time, I said, "Do you know you're supposed to return to the group now," and Amy said, "Oh, yes, but first would you like to buy some Pepsi Cola," and I said yes and she gave me my change.

She asked me if I would come back and I said, "I may come back," and she asked me what was I doing here. I said that I was a teacher and she said, "What grades do you teach," and I said, "Well, I teach first

grade, second grade, third grade, fourth grade and fifth grade," and Amy said, "You don't teach kindergarten," and I said, "No, at this point, I haven't taught kindergarten".

She said good-bye and she hoped I would come back and visit again. As I said, it was a delightful experience. She moved onto a large group

[145]

instruction where the teacher was instructing the total class in front of the class with fisual objects on the board which they were to transfer to their paper.

Amy completed that assignment correctly and at that point, was asked to remove the Earmark because Mrs. Globerman had said she

does not use it to the for the total time she was there.

They prepared for lunch. She went through the line in the cafeteria just as any child would go through the cafeteria line. She seemed perfectly at ease. She seemed to have no problems whatsoever.

I saw Amy as a very comfortable child. I saw one who was very alert to the teacher and to the other children, one who has good work habits and skills, and I see her as a child whose social and academic interactions are excellent.

Q Mrs. Pappas, in your opinion, would the provision of an interpreter in Mrs. Globerman's class at this time add anything of value to Amy's educational progress or to her academic skills?

A Absolutely not.

MR. KUNTZ: Thank you. I have no further questions.

MR. CHATOFF: I would have to object to that. You're asking Mrs. Pappas' opinion as an expert in the area of educating a deaf child. I don't believe there have been any statements on the record indicating that she has any expertise in the area.

MR. KUNTZ: I didn't qualify her because of the pressure of time and try to meet the five o'clock deadline which I did, but I will ask her to state her qualifications for the record.

Q Would you tell us your background and experience?

A I received a bachelor of education from Tufts University. I

have an MS from New Rochelle in special ed.. I have been teaching, this is my eleventh year of teaching. I've had five years of experience in the regular classroom.

This is my sixth year as a resource room teacher and working in a special education situation.

Q As a resource room teacher, what do you do?

A I work with children who are handicapped in areas such as learning disabilities, emotional problems, slow learners, and I have had experience with a multiply-handicapped child.

[147]

MR. ROBERTS: Do you still voice your objection?

MR. CHATOFF: Objection withdrawn.

MR. KUNTZ: I have no further questions.

CROSS EXAMINATION

BY MR. CHATOFF:

Q On your qualifications, you are qualified in special education. Is that special education involving deaf children? A special education teacher can be qualified in the area of deafness, blindness, palsied students. Is your qualification in the area of deaf children?

A No, it is not.

MR. CHATOFF: No further questions.

DISTRICT'S EXHIBIT 3 - EVALUATION OF J. JANIK

INTERPRETER SERVICES FOR AMY ROWLEY
"K" CLASS --- MS. POWER, TEACHER
MR. JACK JANIK, INTERPRETER
FURNACE WOOD SCHOOL
WEEKS OF FEBRUARY 27 TO MARCH 3
MARCH 6 TO MARCH 10

E V A L U A T I O N

After providing interpretive services through the above dates for Amy Rowley, I feel some explanation of my feelings are in order.

In general, interpreting was resisted by Amy almost constantly except during story-telling time which was approximately twenty minutes a day for three days a week. This is accountable since Amy was not used to or aware of this sudden, added attraction in her classroom. This naturally required some adjustment on her part. In fact, my presence did

make Amy different from the other children in their most natural environment which resulted in her initially resisting to cooperate with me.

Amy's teacher, Ms. Power uses the FM Transmitter and together with her concern, awareness and consideration for Amy, the child has everything going for her in a "hearing" school.

Amy functions like any of the other children there. She participates in all activities and assignments without any major problems. She is liked by her peers who <u>are</u> aware of her hearing loss and do speak to her when asking her questions or waiting for an answer.

Her understanding of the English language and how it works is average to above which makes for a lot easier

lip-reading on her part since prior understanding of the language in question is conducive to lip-reading of same. As skillful as she is, Amy however does not get everything and when she does miss something she stops the person(s) in question and has the message repeated.

After my two weeks in the classroom as an interpreter/observer, I feel free to say that Amy is a very well adjusted child despite a serious hearing impairment. But, this loss is the extent of her handicap since there seems to be no other learning hindrances. Amy's teacher is one in a million. She loves her charges and is a wonderful teacher. She does sign a little but more than that, she is a very expressive and talented woman.

The primary happenings in the

classroom are visually communicated. For example, when the children are using exceptionally loud voices or "outside voices", Ms. Power blinks the overhead lights and the children freeze in their positions. Immediately they know that they are making too much noise. After they are reminded to lower their voices, the lights go on again and their play continues using "inside voices." After my two weeks in this environment I can honestly say that I can't remember once hearing Ms. Power talk to the children like they were not young adults.

In conclusion, I would like to say that as far as interpretive services are concerned, they are not needed at this time. However, this does not rule out the fact that an

interpreter will not be needed at a future date when the classroom work becomes more involved and large group discussion becomes the rule.

This whole experience has been a pleasure for me and, if at anytime, I can be of further assistance, please do not hesitate to call on me.

Respectfully submitted,

S.J. Janik, Jr.

PETITION OF AMY ROWLEY TO THE NEW YORK STATE COMMISSIONER OF EDUCATION

STATE OF NEW YORK
COMMISSIONER OF EDUCATION
- - - - - - - - - - - - - -x

In the Matter of the
Education of
AMY ROWLEY, by her Parents,
CLIFFORD ROWLEY and
NANCY ROWLEY,

VERIFIED PETITION

Petitioners,

-against-

HENDRICK HUDSON SCHOOL DISTRICT,

Respondent.
- - - - - - - - - - - - - -x

TO THE COMMISSIONER OF EDUCATION:

The petitioners, CLIFFORD ROWLEY and NANCY ROWLEY, complaining of the respondent, respectfully show and allege:

1. We are now, and at all times hereinafter mentioned, have been citizens of the United States and resi-

dents of the City of Peekskill, County of Westchester, State of New York.

2. The Committee on the Handicapped of the Hendrick Hudson School District met on September 12, 1978 and again on October 3, 1978 to consider the indentification, evaluation, and placement of our daughter, Amy Rowley, who is deaf.

3. At the September 12 meeting, the COH declared Amy to be a handicapped child. On October 5, 1978, the COH recommended that Amy remain in the Furnace Woods School, Hendrick Hudson School District; that she receive the services of a teacher of the deaf one hour daily; and that she receive the services of a speech therapist three days each week.

4. We were not satisfied with that recommendation and therefore, within a

period of ten days (October 12, 1978), we wrote to you, the Commissioner of Education, requesting a formal impartial hearing. By letter dated October 18, 1978, Kenneth Pawson, Esq., of your office, informed us that the request should be made to the Board of Education of the Hendrick Hudson School District. On October 23, we mailed such a request to the Board of Education of the Hendrick Hudson School District and the request was received on October 25, 1978.

5. Pursuant to section 200.5(c)(10) of the Regulations of the Commissioner of Education, the impartial hearing must be held and the decision of the impartial hearing officer must be mailed to us within 45 days of the date on which the request for the hearing had been received. In lieu

thereof, the respondent reconvened its COH on December 11, 1978, 45 days after receipt of our request for an impartial hearing (the 45th day was a Saturday), ostensibly for the purpose of reconsidering its earlier recommendation based upon the affidavit of Robert R. Davila, Ph.D., the letter of Mr. Joel Ziev, protesting the misrepresentation of his position at the October 3 meeting of the COH, and other evidence that had been sent to the attorney for the respondent periodically for the purpose of disclosing material to be submitted at an impartial hearing. The COH reaffirmed its earlier recommendation verbatim with the addition of one innocuous provision (transcript, pages 138-139). Prior to the December 11 meeting of the COH (December 5, 1978), our

attorney wrote to the attorney for the respondent to emphasize that we were not withdrawing our October 23 request for an impartial hearing and that, if we disagreed with the "new" recommendation of the COH, the impartial hearing would have to be held and the decision of the hearing officer forwarded to us within 45 days of the receipt of that request. By letter of December 13, 1978, the attorney for the respondent attempted to argue, in effect, that the respondent's unilateral reconvening of its COH served as an automatic withdrawal of our request for an impartial hearing irrespective of the December 5 letter of our attorney. If the respondent was allowed to accomplish that legerdemain, the Regulations of the

Commissioner of Education would be rendered meaningless.

6. On October 26, 1978, one day following receipt of our request for an impartial hearing, Dr. Frank Eckelt was appointed as impartial hearing officer. After requests for information about Dr. Eckelt had gone unanswered, we made inquiries and learned of his professional association with the Superintendent of Schools of the respondent. On November 25, 1978, we sent to the respondent an affidavit requesting the replacement of Dr. Eckelt for reasons of personal bias. On November 29, 1978, Dr. Eckelt was dismissed for reasons of personal bias. On December 15, 1978, more than 45 days after receipt of our request for an impartial hearing and less than one

week before the actual hearing, Albert P. Roberts, Esq. was appointed hearing officer. We discovered that Mr. Roberts has been an acquaintance of the attorney for the respondent for at least three or four years. Our attorney brought this to the attention of Mr. Roberts and the attorney for the respondent prior to the commencement of the December 20 hearing; at that time, he stated that no request would be made for the appointment of a new hearing officer. It seemed to us that, under no circumstances, would the respondent appoint a truly impartial hearing officer and that continuous objections to the appointment of each new biased hearing officer would serve only to delay this matter. We decided that it was best to conduct a hearing on December 20,

have the facts brought as fully as would be permitted, and then present the matter to you, the Commissioner of Education, for an impartial review of the evidence.

7. We received a copy of Mr. Roberts' decision on January 16, 1979.

8. On page 2 of his decision, Mr. Roberts states that interpreters and transcribers were used by our attorney, who is deaf, and by us "to assist them in hearing the course of the testimony given at the hearing." (Emphasis added) Everyone involved concedes that Amy Rowley is deaf; the hearing involved consideration of the problems of deafness. Just as you cannot teach or assist a blind person to see, you cannot teach or assist a deaf person to hear. You can teach a blind person to comprehend what is

before him; you can teach or assist a deaf person to comprehend what is spoken. Any person who is unwilling or unable to understand that very important distinction is not competent to consider questions of deafness.

9. On page 4 of his decision, Mr. Roberts stated that the memoranda of law of the parties were not considered when reaching his factual conclusions. Closing arguments by opposing attorneys are part of administrative proceedings. Because time did not permit, there were no closing arguments at the December 20 hearing. Prior to the conclusion of that hearing, our attorney asked: "Are you ready for closing statements?" Mr. Roberts replied: "You can reserve that for your written brief." (153) By the clear language of the hearing

officer, the memoranda of law and all papers attached thereto, must be considered as a part of the record of the proceedings for purposes of the hearing officer's decision and subsequent appeal.

10. Mr. Roberts states that the letter from Mr. Joel D. Ziev "in substance indicates that since he had not observed Amy in her school setting that he would be unable to either support or reject the use of an interpreter within the classroom setting." Clearly, that statement would not be helpful to our position. It does not require a great degree of perspicacity to realize that parties to a proceeding are not likely to introduce voluntarily evidence that is objectionable to their position. If Mr. Roberts could not glean the purport of the

letter from its face, he might have referred to the transcript of the proceedings. On page 131, it is indicated quite clearly that Mr. Ziev wrote to Ms. Waldron, the Chairperson of the COH, to object to the misrepresentation of his views, by a member of the COH, at the committee's October 3 meeting.

11. Mr. Roberts omits entirely any reference to our Exhibit No. 2, a memorandum of law prepared by our attorney showing the legal basis for the appointment of an interpreter for a deaf child educated in the least restrictive educational environment. The memorandum includes a statement, made on the Floor of the United States Senate by the ranking minority member of the Subcommittee on the Handicapped, to the effect that the

purpose of the Education for All Handicapped Children Act of 1975 is "to guarantee that properly trained interpreters would be available to our school age deaf population." (The memorandum had been drafted at the request of the attorney for the respondent.)

12. Mr. Roberts understanding of our Exhibit No. 3 is misguided at best. The memorandum, prepared by the Office of Compliance and Enforcement, Federal Office of Civil Rights, states quite clearly that a deaf child must be educated in the least restrictive educational environment with the aid of supplementary aids and services. Primarily, it deals with matters to be considered in the selection of appropriate supplementary aids and services and the extent of review by that Office of individual educational

determination. The placement of a deaf child in a separate or segregated class is mentioned in passing only and only as a last resort (see Hairston v. Drosick, 423 F. Supp. 180, 183 (S.D.W.Va., 1976)).

13. With reference to the statement on page 7 of the decision, regarding the affidavit of Dr. Davila, that interpreter services implement and enhance the communication and camaraderie and hearing among deaf students, see our paragraph no. 8.

14. Ms. Williams was the only witness for the respondent who has had any experience in the education of deaf children. Mr. Roberts did not note that Ms. Williams testified that she uses total communication with Amy during their daily sessions; that she supports the use of total communica-

tion as an effective teaching method in the education of deaf children; and that she agrees with the statements of the experts who support our position (the only expert evidence offered in the proceeding).

15. Mr. Roberts did not note that Ms. Garzione testified that she is interested in Amy's transmittive skills only; that she has no interest in her receptive skills.

16. Mr. Roberts did not note that Ms. Pappas testified that she is not qualified in the area of education of deaf children.

17. Mr. Roberts noted correctly that I (Mr. Rowley) testified that two members of the School Board, who were not present at the hearing, objected to the cost of hiring an interpreter. Naturally, the respondent could not be

expected to respond to statements made by individuals who were not present at the hearing. Mr. Roberts conveniently omitted mention of the fact that I testified that Dr. Zavarella objected to the cost too; that Dr. Zavarella conferred with the attorney for the respondent on my testimony; and that Dr. Zavarella did not take the stand at that time to refute my testimony.

18. Mr. Roberts determined that we are not entitled to an independent educational evaluation. Of course, he has no authority whatever to make such a determination. Upon request, we are entitled, absolutely, to an independent educational evaluation of Amy (Section 200.5(b)(2)(vi) of the Regulations of the Commissioner of Education and 45 CFR§503). By letter of October 26, 1978, the attorney for

the respondent acknowledged receipt of such a request. The evaluation must be at public expense unless the hearing officer, on motion, determines that the parents of the child shall pay therefor. Inasmuch as the attorney for the respondent made no such motion, the hearing officer had no authority to make any determination concerning the request for an independent evaluation. Hence, the provisions of the regulations apply and the evaluation must be provided at public expense.

19. The original testimony of Ms. Globerman was to the effect that she, and Amy's other teachers, formulated a plan for Amy without our participation or input and that the plan had merely been read to us at the December 6, 1978 meeting. Her later testimony

indicated that I (Mrs. Rowley) offered to provide her with information concerning the preparation of an IEP. That testimony relates solely to the procedural preparation of an IEP and indicates no participation or input in the formulation of an IEP for Amy. Additionally, her later testimony was to the effect that I (Mr. Rowley) offered recommendations at the December 6 meeting that were included in District Exhibit No. 7. That testimony contradicts in its entirety Ms. Globerman's earlier testimony. Rather than categorize that glaring inconsistency as "uncontradicted testimony", Mr. Roberts might have taken the time to review the material presented to him. The sheets entitled "Parents Comments" of District Exhibit No. 7 are completely blank. The

Exhibit itself indicates that the plan was formulated in October and November of 1978. Furthermore, District Exhibit No. 8 contains the minutes of that meeting; it contains the recommendation that I offered. I asked the individuals present at the meeting to help Amy if she needs help. That is nothing more than a plea by a person who has been left out of deliberations "to do right by my child." It cannot be considered the input contemplated by State and Federal regulations. Finally, the inconsistent testimony of Ms. Globerman followed immediately after an off the record discussion (111).

20. According to section 200.4(f)(2)(ii) of the Regulations of the Commissioner of Education, a planning conference for the development of an

IEP shall include, inter alia, the parents of the child in question and other individuals at the discretion of the parents. The regulation presupposes that any advice offered by such individuals will be considered by the members of the planning conference. Obviously, a person may appear in person or by sworn affidavit. At the December 6 meeting, we distributed copies of the affidavit of Dr. Robert R. Davila to the individuals present. Nevertheless, Dr. Zavarella dismissed the affidavit summarily. "The point was made that although interesting to us it can have little or no bearing on the development of an IEP." (District Exhibit No. 8)

21. Pursuant to section 4402(1)(b)(1) of the Education Law, a COH "shall invite the appropriate professionals

most familiar with a child's handicap or handicaps to attend any meeting concerning the educational program for such child." (Emphasis added) Inasmuch as the statutory reference is to the child's handicap rather than to the child himself, it seems logical to assume that the reference is to experts to the particular discipline involved -- in this case, the education of deaf children. Nevertheless, the COH did not invite any experts in the area of the education of deaf children to attend any of its meetings. Mr. Denis, a nationally recognized expert in the education of deaf children appeared at the September 12 meeting at our request. Dr. Davila, another nationally recognized educator of deaf children, prepared an affidavit, again at our request, which was

made available to the members of the COH at its December 11 meeting. The committee dismissed out of hand the views of those two educators despite the implicit language of the statute that it take into consideration the views of experts in the field involved. In his decision, Mr. Roberts declared that the views of those two experts and the views of another expert, Dr. Richard G. Brill, "are accorded little weight." (Decision, page 22)

22. Pursuant to section 200.5(b)(2)(ii) of the Regulations of the Commissioner of Education, the respondent must provide us with a notice describing each test or report that it has used as a basis for its proposed actions. We received no such notification. According to the Commissioner

of Education, "a hearing officer in the course of due process proceedings must be provided with the materials upon which the recommendation of the committee [on the handicapped] was based and not merely with the conclusion arrived at by the committees." Matter of the Appeal of Rosanne N., 16 Education Department Reports 346, 347. The respondent has offered only one report by a person not in its employ, i.e., the report of S. Jack Janik, Jr., the interpreter for Amy during a two week trial period during the early part of 1978. It has offered only one report by a person with expertise in the area of deaf children, the same report of S. Jack Janik, Jr. Indeed, unless the short statements by persons in the employ of the respondent who have no expertise

in the area of education of deaf children that are set out in District Exhibit No. 7 (the admission of which we objected to under section 200.5(c)(8)) are considered reports, the report of Mr. Janik is the only report offered by the respondent -- and those short statements were each prepared after the COH decision of October 5. The report of Mr. Janik supports our position; not the position of the respondent.

23. Attached hereto and made a part hereof is an affidavit prepared by me (Mrs. Rowley) concerning Amy's comprehension of class material and the results of my observation of her in class. Document No. I.

24. Attached hereto and made a part hereof is the affidavit of Mr. Roy K. Holcomb, the Coordinator of the Santa

Clara County Programs for the Hearing Impaired. Document No. II.

25. Attached hereto and made a part hereof is the affidavit of Mr. Michael Deninger, the Coordinator of Public Law 94-142 for Gallaudet College. Document No. III.

26. Attached hereto and made a part hereof is the affidavit of Ms. Mary H. Sheie, a teacher of the deaf and an interpreter for the deaf. Document No. IV.

27. Attached hereto and made a part hereof are all communications between our attorney and Mr. Roberts during the period from December 26, 1978 to January 6, 1979. Document No. V.

28. Attached hereto and made a part hereof is the affidavit of S. Jack Janik, Jr. Mr. Janik's qualifications have been set out by Dr. Zavarella at

page 39 of the transcript. Document No. VI.

29. Attached hereto and made a part hereof are copies of papers included in Amy's file maintained by the respondent. They show that considerations other than Amy's best interests were the deciding factors in the respondent's refusal to appoint an interpreter for Amy. Document No. VII.

30. We have repeatedly requested that an interpreter be appointed for Amy so that she would be able to understand what is going on in class; the respondent has repeatedly refused to honor that request. The evidence submitted at the December 20, 1978 hearing and the attached documentary evidence establish the need and justification for the appointment of an interpreter for Amy.

31. The respondent has offered, at various times, several different justifications for its refusal to appoint an interpreter for Amy. It has argued that most of the information transmitted in class is visual. The attached observations show that a very substantial portion of information in Amy's class is transmitted orally. The respondent has argued that Amy lipreads well and that, therefore, she understands what is spoken orally without the aid of an interpreter. That argument was offered by people who have no knowledge of the problems of deaf individuals. The affidavits of Dr. Davila and Mr. Holcomb, both of whom are deaf, make clear that that argument has no basis in reality. It has been suggested that Amy is very "teacher-oriented." As a result of my

observation (Mrs. Rowley), it is apparent that Amy is teacher-oriented towards the teacher she understands, i.e., Ms. Williams, who uses total communication; that she is inattentive when she does not understand what is being said.

32. Amy spends one hour daily with Ms. Williams. Admittedly, Amy understands what is happening during that one hour session. Thus, in the final analysis, the respondent is arguing that it is providing Amy with an appropriate education by providing her with the opportunity to understand what is being said one sixth of the school day. On the other hand, we contend that where, as here, a particular supplementary service (an interpreter) will enable a child with a handicapping condition to understand

what is going on at all times (when academic material is presented), a school district must, according to State and Federal law, provide the child with that service (section 200.4(a)(2) of the Regulations of the Commissioner of Education; 20 U.S.C. § 1412(5)(B); 45 CFR §84.34(a); and 45 CFR §121a.550 et seq.). A school district is required to provide each child with a handicapping condition a full educational opportunity (45 CFR §121a.304); to provide each such child with an appropriate education conterminous with the education provided to his/her peers who do not suffer from such a disability (45 CFR §84.33 (b)(1)). We contend that our daughter is not being provided with a full educational opportunity or an appropriate education when she is supplied

with only enough services to enable her to understand one sixth of her school day.

33. Our daughter can be, should be, and by statute must be educated with her peers who can hear. Per force, there are different matters to be considered in the education of a deaf child. If a deaf child is to be properly integrated with her hearing peers, those matters must be considered by an expert in the education of deaf children so that the proper aids and services will be selected to assure the child a full educational opportunity. Certainly, those matters cannot properly be considered by individuals who have no expertise in the education of deaf children.

34. It may be expensive to provide our daughter with an appropriate

education -- generally, it is more expensive to educate a child with a handicapping condition than a child without a handicapping condition -- but the alternatives (the needless transfer of Amy to a separate facility that would severely limit or prohibit her interaction with her peers who have normal hearing or the less than full development of her skills and abilities) are not acceptable. Most definitely, she has a handicapping condition. We do not want her to grow up to be a handicapped person; we want her to grow up to accept her disability and to learn to compensate for it so that she will be able to attain the full measure of her dreams and aspirations and achieve the full measure of her individual capacities and abilities.

35. Obviously, the respondent is concerned and should be concerned with the cost of educating Amy properly. But its educational determinations must be based soley upon her best interests. Only after the respondent has reached a determination based solely upon her best interests, should it consider the question of limiting costs -- without, in any way, compromising Amy's best interests. It is clear to us that the best interests of our daughter require the use of an interpreter in academic settings to enable her to comprehend what is being said. Two less costly alternatives to hiring a per diem interpreter come to mind immediately; undoubtedly others would come to mind were a little thought applied. Many arrangements used to implement the New York and

Federal laws mandating the provision of an appropriate education to each child with a handicapping conditon are inconsistent and/or duplicative. Proper coordination would assure that children with handicapping conditions would receive appropriate educations at considerably less cost.

WHEREFORE, the petitioners ask that the Commissioner of Education: (1) direct the respondent to provide the petitioners with information about where an independent educational evaluation of Amy may be obtained at public expense or, in lieu thereof, that the respondent reimburse the petitioners for the cost of the observations of Mr. Deninger and Ms. Sheie, inasmuch as Amy's school records should contain such an evaluation; (2) revise the recommendation of the respondent's committee on the handicapped to read as follows:

a. That Amy Rowley remain at Furnace Woods School;

b. Resource Programs:

1. that Amy Rowley receive the services of a speech therapist three times weekly;

c. Supportive Supplementary Assistance:

1. that Amy Rowley receive auditory amplification by use of the FM Wireless or the Unitron 960P, and
2. that an interpreter be appointed for Amy Rowley to interpret for her when academic subjects are taught (including, but not limited to, reading, mathematics, writing, and spelling);

(3) direct the respondent to draft an individualized education plan for Amy Rowley, with the petitioners; (4) grant the petitioners their costs and attorney's fees; and (5) grant the petitioners such other and further relief as justice may require.

Dated: February 24, 1979
Peekskill, New York

CLIFFORD ROWLEY
NANCY ROWLEY
Petitioners

AFFIDAVIT OF NANCY ROWLEY

DOCUMENT I

STATE OF NEW YORK
COMMISSIONER OF EDUCATION

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In the Matter of the
Education of

AMY ROWLEY, by her parents
CLIFFORD ROWLEY and NANCY
ROWLEY,

Petitioners, AFFIDAVIT

-against-

HENDRICK HUDSON SCHOOL
DISTRICT,

Respondent

- - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF QUEENS)

NANCY ROWLEY, being sworn, deposes and says:

1. I am one of the petitioners in the above-entitled action.

2. I am the natural mother of Amy Rowley.

3. I am deaf and I am a certified

teacher of the deaf. Nevertheless, Ms. Garizone, who testified that she has worked with only one other deaf child besides Amy and does not know manual communication, indicated that she knows more about the problems of deafness than I do. Dr. Zavarella indicated that he is an authority on the education of deaf children by virtue of his Ph.D in child development, despite the fact that he has not had any contact with deaf children. Mr. O'Hara, a member of the COH and the principal of the Frank Lindsay Elementary School, stated that there was no need to appoint an interpreter for Amy at this time because "first grade is not that important."

4. I did not provide extensive testimony concerning Amy's educational achievements and non-achievements due

to her deafness because I consider her lack of comprehension to be understood in light of the definition of "Deaf" that appears in 45 CFR§121a. 5(b)(1) ("a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance"). However, in light of Mr. Roberts' decision, I offer the following:

5. I discuss Amy's day in school with her on a daily bais, using total communication. I learn, on a daily basis, that she does not understand what is said in class.

6. On February 2, 1979, Amy came home from school and said to me: "I want the interpreter", because she does not understand what is being said in class.

does not understand what is being said in class.

7. Amy has an IQ of 122; she has been described by her teachers as "highly motivated", "eager and inquisitive", and "eager to learn". (See District Exhibit No. 7). Attached are two examples of the comprehension and English language ability of this intelligent child who is eager to learn. She asked me to explain the sentence; "How nice to be a frog, I can sit all day on a log", because she did not understand what she had written. When asked to write a sentence, she put some words together that formed a "sentence" that made no sense.

8. On several occasions during the early part of this year, I observed Amy in class.

9. Amy has several different teachers. One male teacher has a beard and mustache which hide his lip movement; a female teacher talked with her head down, failed to demonstrate anything manually, and generally indicated a lack of orientation on how to deal with a hearing impaired child in her classroom. Ms. Globerman is not as easy to lipread as I had expected; further, she acts towards Amy just as she acts towards every other child in her class, e.g., she explains new ideas to the class with her back to all the students, including Amy.

10. The desks in Ms. Globerman's class are arranged in such a way that Amy can see only the backs of one fourth of the other students.

11. I would estimate that seventy percent of academic material is conveyed to the students in Amy's classes orally. I am considered to be a good to excellent lipreader. I understand, at most 30 percent of oral communications during my period of observation. Each day of my observation period, when I returned home I tested Amy to see how much of what I understood she understood. She failed to understand or misunderstood much of that information.

12. Ms. Williams uses total communication in her daily sessions with Amy. During those daily sessions, Amy is attentive and eager to learn. During Amy's other classes, she is attentive when material is presented visually or when she writes or works individually -- she is

inattentive when material is presented orally, which she cannot understand.

13. I want Amy to understand everything in class that other students understand; I do not want to see her fall behind other students in her class because of a disability that can be compensated for.

14. An interpreter would enable Amy to understand oral communications in class -- communications that she does not understand now. Also, if an interpreter were assigned to assist Amy, her teachers would not have to devote more time to her than they

devote to every other child in their classes.

NANCY ROWLEY

Sworn to before me this

_____ day of February, 1979.

EXHIBIT TO ROWLEY AFFIDAVIT - EXAMPLES OF COMPREHENSION AND ENGLISH LANGUAGE ABILITY OF AMY ROWLEY

Amy

How nice to be a frog.
can sit all day on a log.

1 for home work write 2 more sentences

This doen't make any sense!

called my valentine asked

The bed a valentine said the bed.

The mouse said a owl I never heard of that

AFFIDAVIT OF MICHAEL L. DENINGER

DOCUMENT III

STATE OF NEW YORK
COMMISSIONER OF EDUCATION
----------X
In the Matter of the
Education of
AMY ROWLEY, by her Parents, CLIFFORD ROWLEY and NANCY ROWLEY,

AFFIDAVIT

Petitioners

- against -

HENDRICK HUDSON SCHOOL DISTRICT,

Respondent.
----------X

MICHAEL L. DENINGER, being sworn, deposes and says:

1. I am Michael L. Deninger, Coordinator of Public Law 94-142 Program at Gallaudet College, Washington, D.C. A major purpose of this program is to monitor and evaluate the implementation of Public Law 94-142, specifically as it relates to the education

of hearing impaired persons.

2. I am an educator of the deaf with more than 10 years of experience in all aspects of education and rehabilitation of deaf persons. I hold an M.S. degree in education of the deaf and am a candidate for the Phd. in Special Education Administration from Gallaudet College. I have taught in and/or administered all levels of programs for deaf students, including positions at the Model Secondary School for the Deaf (Washington, D.C.), St. Mary's School for the Deaf (Buffalo, New York), and the National Technical Institute for the Deaf (Rochester, New York). I am a certified interpreter for the deaf, a trainer and evaluator of interpreters and a past president of the Potomac Chapter, Registry of

Interpreters for the Deaf. In my present position I am responsible for the development and dissemination of information about Public Law 94-142 and its impact on the education of deaf persons.

3. At the request of the above-mentioned petitioners, I did observe Amy Rowley in classes at the Furnace Woods School on Thursday, February 15, 1979, in order to assess the extent to which Amy was understanding what occurred inside and outside of the classroom and to determine whether or not an interpreter would be necessary to provide Amy an appropriate program.

4. Based on all of my observations, my discussion with Amy, her parents and the teachers and

Principal of her school, I offer the following:

i. Amy is a profoundly deaf child whose amplification system at school consists of an FM Wireless Trainer which her teachers use to assist in communicating with her.

ii. Amy receives one hour of instruction per day from Ms. Sue Williams, a teacher of the deaf. The auditory training exercises I observed in Ms. Williams' class indicated that Amy does receive sound input from the FM Wireless system, but that comprehension is negligible without simultaneous speechreading.

iii. Amy had no difficulty in understanding the instructions of Ms. Williams because she used a combination of speech and sign language when communicating with Amy.*

*In order to estimate in a more objective fashion the degree to which Amy was understanding and involved in the classroom communication process, a simple scale was adapted from the work of Ned Flanders and others with "Interaction Analysis". Using this scale I noted periodically (usually once every 30 seconds) who was controlling the conversation and, whether Amy was understanding or not. For the

5. In a small reading group led by Mrs. Globerman Amy understood only approximately 25% as the teacher and students read aloud from their books. Amy understood simple questions and instructions from the teacher, but, while the FM Wireless was passed from student to student the teacher's comments were not received by Amy. Amy

---

purpose of gathering this information, Amy was assumed to be understanding unless she was clearly confused, asked irrevelant questions, or was not watching the face of the speaker (this based on the fact that Amy's comprehension is negligible with amplification alone).

was able to "keep her place" by depending on visual clues from other students. However, during the class Amy had little access to the spoken word.

6. In an afternoon portion of Mrs. Globerman's class a story was read to the entire class by the teacher and an aid. The students were seated on the floor, on desks, chairs and some stood. Amy was seated on the outside of the group to the far right. One-half of the story was read by the aid at a very fast pace. It is my conclusion that Amy understood less than 10% of what was read. This is reinforced by the fact that Amy rarely attended to the face of the reader. Finally, countless questions or spontaneous remarks from students were missed by Amy because she was unable

to lipread them. An interpreter could have kept Amy informed.

7. In art class with Mrs. Garber Amy understood little of what was said, but was able to follow the demonstration of how to do the project. The teacher rarely faced Amy to allow her to lipread and talked at a very rapid pace. Again, Amy was able to use visual clues to see what to do, but she understood less than 10% of the discussions.

8. Generally speaking, when Amy was in small group discussions with one or more students she comprehended approximately 40% of the discussion. When Amy initiated discussions, she was understood by other students approximately 50% of the time.

9. During special assemblies, movies or field trips, Amy does not

have the assistance of an interpreter. Because of the distance away from the speaker and environmental aspects such as lighting, Amy probably understands little of what transpires. Ms. Williams agreed to the need for an interpreter in these settings.

10. It appeared that Amy's teachers and Principal did not fully comprehend the isolation effect of a profound hearing loss or the limitations of amplification devices. Each of Amy's teachers began sessions by asking Amy if she "could hear". To me this means "Is your trainer working" and definitely not "Are you understanding me?" Dr. Zavarilla commented that he thought Amy is getting more from the auditory trainer than Ms. Rowley thinks.

11. In my professional opinion Amy Rowley is currently in need of an interpreter if her placement at the Furnace Woods School continues. Amy is at a particular disadvantage when group presentation or discussions occur and, even with adequate seating and amplification, she will continue to be deprived of much of the communication that takes place around her.

12. The need for professional interpreters in regular classrooms has been elaborated on previously in this question (See affidavit of Dr. Robert R. Davila). I assisted with the development of this affidavit and subscribe to its major tenets. I further believe that I have demonstrated in this affidavit that some of the potential problems that arise when a deaf child is placed in a regular classroom

were observed at the Furnace Woods School. Teachers talking too fast or not facing the deaf student, poor seating arrangements and unrealistic expectations from amplification equipment are among these.

13. An interpreter service, carefully planned and executed would greatly improve the communications process for Amy Rowley and increase her ability to achieve even more academically, while also reducing the possibility of any harmful effects on her due to inadequate communication with her teachers and her peers.

MICHAEL L. DENINGER

(NOTARIZATION)

AFFIDAVIT OF MARY H. SHEIE

DOCUMENT IV

Affidavit Prepared by:

Mary H. Sheie, M. Ed.
Teacher and Sign Language
Interpreter for the Deaf
Goshen, NY 10924

I am Mary H. Sheie of Goshen, New York. I am a certified teacher of the deaf and interpreter for the deaf. My certification also extends to nursery, kindergarten, and grades one through six. My seven years of experience include teaching the deaf, teaching American sign language, interpreting for the deaf in courts, classrooms, and social services, and serving as a manual language consultant for agencies that service non-verbal children and adults. In this affidavit, I would like to report on the observations I made of Amy Rowley in the Furnace Woods School on February

2, 1979.

I first observed Amy in a class discussion about ground hog day. The teacher, Mrs. Regina Globerman, faced the class in this discussion, using the microphone of the FM wireless as she addressed them. The class was seated in a "U" shape. During the discussion, Amy did not always watch the teacher or other members of her class. However, she freely participated in the discussion, giving correct answers and responses. Because I was not able to be absolutely certain how much of the discussion she was receiving (either visually or auditorily), I feel that there is a need for formal tests to determine the actual percentage of comprehension in a large group discussion.

Amy then moved to a small reading

group which was seated around a rectangular table. She was in the first seat on the teacher's left. The teacher wore the microphone of the FM wireless when she spoke and passed it to each child to use as he or she read. Some children were not visible to Amy while they read. Consequently, it was not possible to determine through observation alone whether she was hearing or speechreading what they were saying. The only time she appeared to be lost was when another child was being given feedback on his pronunciation of a word. Again, the question of whether Amy is comprehending detail in class discussions, small or large group, warrants further and more accurate testing. After the reading group was finished, the children were required to complete a

written assignment related to the story just read. Amy returned to her seat to do the work independently. She worked quietly, and asked the boy next to her for help several times. It was questionable at this point whether she had understood the directions for this assignment. This is another area in which I feel she should be formally tested--to see if she can follow verbal directions for a written assignment such as this, and also how this compares with other students' performances of the same task. In addition, Amy may need to be checked routinely on whether she is encoding and decoding oral and written information rather than recoding, something deaf children frequently exhibit, masquerading as comprehension.

Following completion of written work, Amy went for her daily individual session with the teacher of the deaf, Ms. Sue Williams. The session included an auditory training lesson and a speech and language activity emphasizing rhyming words. Here again, I observed the need for ascertaining a percentage reading of Amy's reception of oral communication, i.e. how many repetitions are needed for speech reception--one, two, or more--and what percentage of the time does Amy respond on one, two, or more repetitions on both predictable and random material? This conclusion was based on the observation that even in this one-to-one situation Amy needed repetition, and these lessons were very predictable.

After the latter session was completed, Amy returned to her class who was in the middle of a discussion about a film they had just seen. I observed that Amy seemed unable to pick up on the context of the discussion. Many variables were changed, e.g. a different teacher was leading the discussion, the room was very crowded as there were two classes meeting together in this room, and there was a question as to whether Amy was able to make use of her hearing aid (the FM wireless). This appeared to be the most complex of the morning's varied communication situations. It is not surprising that Amy appeared to be totally lost.

I also observed Amy during her lunch period and noted that she was not socializing with her peers on more

than a superficial level. This was also noticeable to a lesser degree earlier in the day.

After lunch, Amy rejoined her class for the viewing of a film about Eskimos. She sat in front but was far from the sound source. She indicated that she could not understand what the film was about. It was my observation that she should be tested also for her auditory discrimination abilities for films in particular.

To summarize, the impression I gained from observing Amy Rowley in her first grade class at Furnace Woods School was twofold: (1) There is a great need to establish an accurate, objective testing procedure for Amy to monitor her progress. Characteristically, deaf children are too quick to hide their failure to understand, and

Amy is no exception. One cannot, by mere observation, determine how much material Amy is comprehending. Therefore, such testing should especially focus on comprehension skills of information presented--in class discussions, in small group discussions, in one-to-one situations, in social situations where more than one person is speaking, and in assemblies and/or viewing of films. It should be the kind of testing that provides clearcut statistical data--a proportion of information she is getting in each of the various situations. Such data should also be collected on a hearing student of comparable abilities to provide a source of comparison. If, in fact, such data shows that Amy is not receiving certain information as readily as her peers, then her present

supplemental services should be re-evaluated. Also, if the information she is not receiving consists primarily of details, then other measures should be taken to determine the impact of this deprivation of tertiary input on her educational future. It would also be important that this testing be done by a professional qualified in the field of deafness--not a speech clinician but a language and reading specialist--who can do an independent, objective evaluation. (2) Amy's apparent social isolation should be taken into consideration. Perhaps further observtions could be done to verify if this is in fact, true.

In conclusion, I would like to state that this observation report is in no way an attempt to undercut the

efforts of the staff at Furnace Woods School. They are making valuable contributions to insure Amy's success in school. However, it appears that these efforts, no matter how valiant, cannot bridge the communication gap between Amy and her educators. Visual presentation of oral communication is the only sure way to guarantee that a mainstreamed deaf child is receiving information with the same accuracy and consistency as his or her hearing peers. For this reason, interpreter services should be considered in the event that independent, objective evaluation reveals the existence of a communication gap.

Mary H. Sheie, M. Ed.
Teacher and Interpreter
for the Deaf
Goshen, NY 10924

date

Sworn to, before
me, this 13th day
of February, 1979

Notary Public

AFFIDAVIT OF S. JACK JANIK, JR.

DOCUMENT VI

STATE OF NEW YORK
COMMISSIONER OF EDUCATION
----------X
In the Matter of the
Education of
AMY ROWLEY, by her Parents,
CLIFFORD ROWLEY and
NANCY ROWLEY,

AFFIDAVIT

Petitioners

- against -

HENDRICK HUDSON SCHOOL DISTRICT,

Respondent.
----------X

STATE OF NEW YORK)
:
COUNTY OF NEW YORK)

S. JACK JANIK, Jr., being sworn, deposes and says:

1. At present, I am self-employed.

2. From February 27 to March 10, 1978, I served as the interpreter for Amy Rowley in her kindergarten class at Furnace Woods School, Hendrick Hudson School District, Westchester, New York. The class was taught by a Ms. Power.

3. The purpose of this affidavit is to clarify the evaluation I prepared following the period during which I provided interpreter services for Amy. I did not say that Amy did not need an interpreter in kindergarten. My evaluation was limited to that particular class of Amy's and not to kindergarten classes generally. I stated that interpreter services were not needed in that particular class only, because of Ms. Power's "concern, awareness and consideration of Amy" and because Ms. Power "is a very

expressive and talented woman." Nor did I indicate that an interpreter would not be needed for Amy subsequent to kindergarten; indeed, my evaluation suggests that an interpreter will be needed "at a future date when the classroom work becomes more involved and large group discussion becomes the rule."

4. Following the two week period during which I provided interpreter services for Amy, Dr. Zavarella, the principal of Furnace Woods School, stated that the Board of Education of the Hendrick Hudson School District would not retain an interpreter for Amy irrespective of my findings during the two week trial period because it deemed the cost excessive. Also, Dr. Zavarella suggested that it would be in the best interests of all parties

for Mr. and Mrs. Rowley to take Amy out of the Furnace Woods School and enroll her in the New York School for the Deaf in White Plains.

S. JACK JANIK, Jr.

[Notarization]

AMENDED COMPLAINT OF AMY ROWLEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs

v.

The BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

AMENDED COMPLAINT

Civil Action File No. 79/2139

----------X

The plaintiffs, for their complaint and claims against the defendants, through Michael A. Chatoff, their attorney, allege:

1. The action arises under section 615 of the Education of the Handicapped Act, as added by 89 Stat. 788,

U.S.C., Title 20,§1415; section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, U.S.C. Title 29, §794; U.S.C. Title 28, §1343; U.S.C. Title 42,§ 1983; and section 4403(3) of the Education Law of the State of New York, as implemented by section 200.5(c)(10) of the Regulations of the Commissioner of Education of the State of New York, as hereinafter more fully appears.

2. Plaintiffs are now, and at all times herein mentioned were, citizens of the City of Peekskill, County of Westchester, State of New York.

3. Plaintiffs live within the boundaries of the defendant school district.

4. Plaintiffs have exhausted all administrative remedies set forth in the statutory provisions enumerated in

paragraph one hereof.

5. The defendant school district has failed to provide Amy Rowley with an education conterminous with her nonhandicapped peers, in violation of the requirements of the Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act of 1975, Public Law 94-142, as implemented by 45 CFR§121a.1 et seq.; section 504 of the Rehabilitation Act of 1973, 29 U.S.C.§794, as implemented by 45 CFR§84.31 et seq.; and section 4401 et seq. of the Education Law of the State of New York, as implemented by section 200.1 of the Regulations of the Commissioner of Education of the State of New York.

6. Plaintiffs have been denied the due process of law guaranteed to them by the Fifth and Fourteenth Amendments

to the Constitution of the United States and by Federal and State statutes, by the appointment of a hearing officer by defendant school district who was neither impartial nor competent to review the matters in controversy and by the failure of the defendant, Commissioner of Education, to review the record before him independently and impartially.

WHEREFORE, it is demanded that this court:

(1) revise the recommendation of the defendant school district's committee on the handicapped to read as follows:

a. That Amy Rowley remain at Furnace Woods School;

b. Resource Programs:

1. that Amy Rowley receive the services of a speech therapist three times weekly;

c. Supportive Supplementary Assistance:

1. that Amy Rowley receive auditory amplification by use of her own hearing aids, which are Unitron 960Ps, and

2. that a certified sign language interpreter be appointed for Amy Rowley to interpret for her when academic subjects are taught (including, but not limited to, reading, mathematics, writing, and spelling);

(2) direct the defendant school district to draft, with Mr. and Mrs. Rowley, an individualized education program (IEP) for Amy Rowley in accordance with the revised recommendation of the committee on the handicapped;

(3) award the plaintiffs their costs and attorney's fees in accordance with section 505(b) of the

Rehabilitation Act of 1973, 29 U.S.C.§ 794(b); and

(4) grant the plaintiffs such other and further relief as justice may require.

MICHAEL A. CHATOFF
Attorney for Plaintiffs
192-05 Radnor Road
Jamaica, New York 11423
(212) 464-7622

ANSWER OF DEFENDANT HENDRICK HUDSON CENTRAL SCHOOL DISTRICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right, Plaintiffs	AMENDED ANSWER Civil Action File #79/2139
- against -	
THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County,	
- and -	
COMMISSIONER OF EDUCATION of the State of New York, Defendants.	

Defendant, Hendrick Hudson Board of Education, by its attorneys Kuntz and Spletzer, P.C., answers the Complaint of the Plaintiffs as follows:

1. Denies each and every allegation contained in paragraphs 1, 2, 3, 4, 5, and 6.

2. As and for an affirmative defense, alleges each of the grounds set forth in the Motion to Dismiss the Complaint, including the ground of no standing to sue for lack of a private right of action, as if the same are fully set forth herein.

Dated: September 19, 1979

Yours, etc.,

KUNTZ & SPLETZER, P.C.
Attorneys for
Defendant Board
Box 3330
21 Davis Avenue
Poughkeepsie, NY 12603
(914) 454-5030

ANSWER OF DEFENDANT COMMISSIONER OF EDUCATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs

ANSWER

Civil Action File No. 79/2139

- against -

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, and the COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.
----------X

Defendant Gordon M. Ambach, Commissioner of Education of the State of New York, by his attorney, Robert D. Stone, Paul E. Sherman, Jr., of Counsel, answers the complaint of plaintiffs as follows:

FIRST. Denies each and every allegation contained in paragraphs 1, 2, 3, 4, 5, and 6.

SECOND. As and for an affirmative defense, joins with defendant Hendrick Hudson Board of Education in alleging each of the grounds set forth in defendant's motion to dismiss the complaint, including the ground of no standing to sue for lack of a private right of action, as if the same are fully set forth herein.

THIRD. As and for a second affirmative and complete defense thereto, that the decision of the Commissioner of Education dated April 10, 1979 which is attached hereto and made a part hereof, was fully supported by the record before the Commissioner and

was not arbitrary, capricious or an abuse of discretion.

Dated: September 24, 1979
Albany, New York

Yours, etc.,

Robert D. Stone
Attorney for Defendant -
Gordon M. Ambach
Paul E. Sherman, Jr.,
of Counsel
Office and Post Office
Address
State Education Building
Albany, New York 12234
(518) 474-1989

By: _____
Paul E. Sherman, Jr.

NOTICE OF MOTION BY HENDRICK HUDSON CENTRAL SCHOOL DISTRICT TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs

NOTICE OF MOTION

79 Civ. 2139

v.

The BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, State of New York

Defendants.
----------X

SIRS:

PLEASE TAKE NOTICE that the Defendant Hendrick Hudson School District, by its attorneys Kuntz, Lewis & Spletzer, P.C., will move this Court before the Hon. Vincent Broderick, United States District Judge, on July

6, 1979 at 2:30 p.m., with opposing papers to be served and filed on June 29, 1979, in Courtroom 36, on submission upon the annexed Affirmation and Memorandum of Law pursuant to Local Rule 9(b) and General Rule 12(B) to dismiss for lack of jurisdiction over the subject matter, and the Defendants, and that the Plaintiffs have not exhausted either their state, judicial or federal administrative remedies and that there is no subject matter jurisdiction hereunder 29 USC 794, 42 USC 1983, or 28 USC 1343, nor any statutory provision for the allowance of damages or counsel fees herein, or, in the alternative, to dismiss for failure to join a necessary party.

Dated: Poughkeepsie, NY
June 18, 1979

KUNTZ, LEWIS &
SPLETZER, P.C.
Attorneys for
Defendant

Raymond G. Kuntz

AFFIRMATION OF RAYMOND G. KUNTZ, ESQ.,
IN SUPPORT OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs,

v.

AFFIRMATION

79 Civ. 2193

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, State of New York,

Defendant.

----------X

RAYMOND G. KUNTZ, duly affirming says:

1. I am an attorney admitted to practice before the Southern and Eastern District Courts, and before the Courts of the State of New York, and I make this Affirmation in support of the Defendant's Motion for an Order pursuant to Rule 9(b) of the Southern

District, and General Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the Complaint on the following grounds: 1) there is no jurisdiction over the subject matter; 2) the Defendants are not proper parties; 3) the Plaintiffs have failed to join the Commissioner of Education of the State of New York as a necessary party; and 4) the Plaintiffs have not exhausted their State, judicial or Federal administrative remedies.

2. The Plaintiffs have predicated their action on the following statutes: 1) 615 of the Education of the Handicapped Act, 89 Statute 7788, USC Title 20, Section 1415; 2) Section 504 of the Rehabilitation Act of 1973, 87 Statutes 394, USC Title 29 Section 794; 3) USC Title 28, Section 1343; 4) USC Title 42, Section 1983; 5) Section

4403(3) of the Education Law of the State of New York, as implemented by Section 200.5(c)(10) of the Regulations of the Commissioner of Education of the State of New York.

3. While a plaintiff may plead contradictory allegations to establish jurisdiction, the Complaint should set forth that fact and plead the allegations in the alternative or reconcile them in some fashion. In this pleading, that has not been done. In essence, the Plaintiffs allege that the Defendants have failed to provide Amy Rowley with a full time certified interpreter for the deaf in her classroom and thereby have denied her an education coterminus with that of her non-handicapped peers.

4. The Plaintiffs have advanced their contentions previously before

the Department of Health, Education and Welfare, before the Committee on the Handicapped for the Hendrick Hudson School District, before an independent hearing officer on an appeal from the recommendation of the Committee, and before the Commissioner of Education of the State of New York on appeal from the determination of the independent hearing officer. In each case, the agency or office found that there was no violation of law.

5. In September, 1977, the Plaintiffs filed a Complaint with the Department of Health, Education and Welfare, alleging that the School District was engaged in discriminatory conduct in violation of Section 504 of the Rehabilitation Act of 1973 for failure to provide Amy with a full time interpreter. In response to the

Complaint, HEW commenced an investigation. HEW's letter to the District dated September 30, 1977 announcing its investigation is annexed as Exhibit A.

6. On May 12, 1978, the District was notified by the Office for Civil Rights that HEW had completed its investigation of the allegations and, on the basis of its investigation, had determined that the District was in compliance with 45 CFR 84, despite the fact that it had not provided Amy Rowley with a full time interpreter. A letter to that effect from William R. Valentine, the Acting Director of the Office for Civil Rights of HEW, Region 2, of May 12, 1978 is attached as Exhibit B.

7. The Plaintiffs took no steps to appeal the determination of the

Regional Office to Washington, and no administrative review of that determination was sought, although 45 CFR 81 provides for hearings under Part 80 of that title.

8. At the beginning of the 1978-79 school year, when Amy Rowley began first grade, the Plaintiffs appeared before the School District's Committee on the Handicapped to request the presence of a full time interpreter in Amy's first grade class. On September 12, and October 3, 1978, the Committee met to consider various proofs, Affidavits and testimony presented by the Plaintiffs in support of their demand. The Committee determined that Amy Rowley was progressing satisfactorily and denied the request. The Plaintiffs sought to introduce additional proof and documentation and the

Committee met again on December 11, listened to those proofs, and reaffirmed its decision. The Plaintiffs appealed the Committee's determination to an independent hearing office pursuant to Section 4404(1) of the Education Law of the State of New York.

9. Attorney Albert P. Roberts was designated as the independent hearing officer and a hearing was held before him on December 20, 1978. The Commissioner of Education has, by regulation, made the determination of the independent hearing officer final and binding upon the parties, subject only to an appeal to the Commissioner of Education. See Section 200.5(c)(10), 8 NYCRR. On January 12, 1979, Mr. Roberts rendered a 25-page decision fully examining all of the Plaintiffs' contentions. He concluded that the

educational program provided by the District for Amy Rowley was appropriate to her individual circumstances and needs. The decision is attached as Exhibit C.

10. The Plaintiffs appealed the determination of the hearing officer to the Commissioner of Education by a notice of Petition dated February 24, 1979. The School District submitted an Answer to the Petition and the Commissioner of Education rendered a decision on April 10, 1979. In the decision the Commissioner stated, in part:

> "The witnesses who testified on behalf of the Respondent [the School District] clearly indicated that the child is progressing satisfactorily in her present placement and is considered at the top of the middle group in her class. The child's first grade teachers stated that the youngster has learned addition, subtraction, and reading since coming to her

> class, and is in fact, capable of assisting other pupils in the class. The child's other teachers and the school principal, who have been observing her on a daily basis, also agree that satisfactory progress is being made and that the presence of a sign language interpreter is not required at this time. Since the Petitioners have failed to show the present placement offered by the Respondent is inappropriate, inadequate or unsuitable, there is no legal basis to grant the relief requested."

The Commissioner's decision is attached as Exhibit D.

11. On May 8, 1979, the Plaintiffs commenced the present action. One of the jurisdictional basis asserted by the Plaintiffs is 20 USC 1415. At Subdivisions (c) that law states:

> ". . . any party aggrieved by the findings and decision rendered in such a hearing [by the independent hearing officer] may appeal to the state educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review."

The officer who conducted the review is the Commissioner of Education, who has not been made a party to the suit. In this case, the named Defendants have made no determinations. The Committee on the Handicapped is an independent entity whose members are appointed by the Board of Education. Under New York State Law, Education Law 4402(1)(b)(1), the Committee must be composed of at least a school psychologist, a teacher or administrator of special education, a school physician, and a parent of a handicapped child residing in the School District. The Committee makes recommendations to the Board of Education, but its recommendations may be appealed to an independent hearing officer, and pending that appeal, the child must remain in the present

educational placement. Under the Regulations of the Commissioner of Education, 8 NYCRR 200.4(d)(4)(ii) deaf children must receive a minimum of one hour instruction by a certified teacher of the deaf, five days per week. The Committee's recommendation was that Amy Rowley continue to receive that instruction and the services of a certified speech instructor three times a week. Amy Rowley received such assistance all through the 1978-79 school year. No member of the Board of Education served on the Committee on the Handicapped, and its determination is completely independent of the School Board. The hearing officer's determination was independent, as was the decision of the Commissioner of Education.

12. The Plaintiff's only basis for jurisdiction is 20 USC 1415. The

other jurisdictional allegations are spurious. The Rehabilitation Act of 1973, 29 USC 794, has no application to elementary education or to the Plaintiff's complaint. In order to bring an action predicated on 28 USC 1343, the Plaintiff must allege an amount in dispute in excess of $10,000. No such allegation has been made. In order to bring an action under 42 USC 1983, the Plaintiffs must allege deprivation of a Constitutional or legal right through state action. No such allegation has been made.

13. The Plaintiffs have invoked federal procedures through their appeal to the Department of Health, Education and Welfare, then abandoned them, then invoked state procedures, and now appeal to the federal court from the state procedures, without having exhausted those procedures.

Although not dispositive of the issues, the Plaintiffs have previously argued before this Court that the Commissioner of Education is not a necessary party to this suit because the federal action is in the nature of an appeal from the Commissioner's decision, but the only statute under which they can premise a federal action, 20 USC 1450, clearly states that the Commissioner's decision is "independent" and therefore stands in place of all previous decisions. Under Section 310 of the New York State Education Law, the Commissioner's determinations are fully dispositive of any action taken by the local Board of Education, and for the purpose of Section 1415, the Commissioner stands in the place of the School District. The School District is not a proper party to the

action, since it is not the School District's determination which is being reviewed, but the Commissioner's.

14. In the State law implementing the federal policy, Education Law 4404(3), the Commissioner's determination "may only be reviewed in a proceeding brought in the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules." It is the Commissioner's decision which is reviewed under the state statute, not the School District's or the independent hearing officer's. In this Motion, the Defendants urge the Court to find that no jurisdiction exists because the Plaintiffs have failed to follow that statute, or in the alternative, to abstain from jurisdiction on the ground that the state courts

are fully capable of determining the Plaintiffs' claims. But it is quite clear no matter what alternative is adopted, that it is the Commissioner, and not the School District, who should be defending the Commissioner's independent decision. The School District should not be a party to the action, except if it asks for permission to appear in an action against the Commissioner of Education.

15. It is respectfully requested that the Court dismiss the Plaintiffs' Complaint on the grounds recited, or in the alternative, abstain from invoking its jurisdiction.

16. The foregoing is duly affirmed under the penalties of perjury.

Dated: June 18, 1979

Raymond G. Kuntz

EXHIBIT A TO KUNTZ AFFIRMATION - LETTER FROM HEW TO HENDRICK HUDSON CENTRAL SCHOOL DISTRICT DATED SEPTEMBER 30, 1977

September 30, 1977

Dr. Thomas J. Jenkins
Superintendent
Hendrick Hudson School District of Peekskill
61 Trolley Road
Montrose, New York 10548

Dear Dr. Jenkins:

This is to inform you that we have received a complaint which we consider to be of an emergency nature alleging that the Hendrick Hudson School District is engaged in discriminatory conduct in violation of Section 504 of the Rehabilitation Act of 1973 because of failure to provide Amy Rowley with the necessary related services needed to afford her an equal educational opportunity.

Frank D. Cedo, Equal Opportunity Specialist, spoke to you on Tuesday, September 20, 1977 to review the principal issues of the complaint, and was advised that our office was welcome to visit the Furnace Woods Elementary School to observe the situation, and to discuss specific particulars with the school's Principal, Dr. Joseph Zavarella. Mr. Cedo called Dr. Zavarella on September 26, and made arrangements to meet with him on September 27.

Because particularly prompt action appears warranted in this case, we shall investigate whether or not a violation of Section 504 has occurred within 60 days of receipt of the complaint. If in fact a violation has occurred, we will seek corrective action through negotiations with your school district. In the event that we are unable to secure an appropriate remedy within 120 days of receipt of the complaint we shall initiate formal enforcement action 30 days thereafter by commencing administrative proceedings or referral of the complaint to the Department of Justice.

This office is committed to a timely and efficient resolution of this matter. We are therefore requesting that you send us the following information no later than 15 days after receipt of this letter:

1. What is being done to specifically address the unique educational needs of the complainant's daughter?

2. As a related issue, How were the educational needs of this student assessed?

3. What short range and long range plans do you have for assuring that Amy Rowley will be afforded a free appropriate public education? Please review Sections §84.33 - §84.35 with regard to procedures for complying with Section 504 of the Rehabilitation Act of 1973.

We appreciate your cooperation in this matter. If you have any other information you wish to submit that may help in this investigation, or if you have any questions concerning this matter, please do not hesitate to contact us. Mr. Frank D. Cedo, Specialist, has been assigned to handle this case. He can be reached on 212/264-9374.

Sincerely,

Nilda I. Koenig
Chief, Elementary/Secondary Education Branch
Office for Civil Rights

EXHIBIT B TO KUNTZ AFFIRMATION - LETTER
FROM HEW TO HENDRICK HUDSON CENTRAL
SCHOOL DISTRICT DATED MAY 12, 1978

In reply, please refer to:
Case #77-0112

Mr. Charles V. Eible, Superintendent
Hendrick Hudson School District
61 Trolley Road
Montrose, New York 10548

Dear Mr. Eible:

The Office for Civil Rights has completed its investigation of the allegations of violations of Section 504 of the Rehabilitation Act of 1973, filed by Clifford and Nancy Rowley against the Hendrick Hudson School District.

On the basis of our investigation, we have determined that the Hendrick Hudson School District is in compliance with 45 CFR 84 as it relates to the education of Amy Rowley, daughter of Clifford and Nancy Rowley.

Thank you for your cooperation in this matter. If we can be of assistance to you at any time, please do not hesitate to contact us.

Sincerely,

William R. Valentine
Acting Director
Office for Civil Rights, Region II

AFFIRMATION OF MICHAEL A. CHATOFF, ESQ., IN OPPOSITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs

- against -

The BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, State of New York,

Defendant.

----------X

AFFIRMATION IN OPPOSITION

Civil Action File No. 79/2139

MICHAEL A. CHATOFF, affirming under pain of perjury, says:

1. I am the attorney for the plaintiffs in the above-entitled action and I am familiar with the proceedings therein.

2. I make this Affirmation in opposition to the defendant's motion to dismiss, dated June 18, 1979.

3. As is more fully explained in the attached Memorandum of Law, various of the motions set forth by the defendant are asserted inappropriately under Rule 12(b) of the Federal Rules of Civil Procedure.

4. This court has jurisdiction over the subject matter; all jurisdictional bases set forth in the plaintiff's complaint are correct and appropriate.

5. There is no party that should be joined under Rule 19, F.R.C.P., that has not been joined.

6. At this juncture, a discussion of the facts in this case is not warranted. Because a 12(b)(6) motion has not been presented, no discussion on

the merits would be appropriate until after issue is joined. However, a brief statement about the degree of review to date may be helpful. By letter of May 12, 1978, the Office for Civil Rights made it clear that it did not and could not make any educational judgments concerning Amy Rowley. See Exhibit A. The propriety of the review of the defendant's committee on the handicapped and the hearing officer, appointed by the defendant, is discussed in the plaintiff's petition to the New York State Commissioner of Education. The comparison, attached hereto as Exhibit B, suggests the scope of review conducted by the Commissioner.

7. The defendant has offered a potpouri of motions, most of which are not proper under Rule 12(b), and none

of which come even close to being on target. The Memorandum of Law of the defendant is replete with errors of law. The motions are a thinly veiled attempt to delay this case, despite the fact that the attorney for the defendant stated in Chambers that he agreed with my assertion that "time is of the essence."

WHEREFORE, it is respectfully requested that:

1. the motions herein be denied in all respects;

2. the defendant be required to file an answer immediately, pursuant to the court's authority under Rule 12(a);

3. costs of this motion be taxed against the defendant; and

4. the court impose any penalties against the defendant that it may deem proper.

Together with such other and further relief as to this court may seem proper in the premises.

MICHAEL A. CHATOFF
Attorney for Plaintiffs
192-05 Radnor Road
Jamaica, New York 11423
(212) 464-7622

Dated: Jamaica, New York
June 26, 1979

DISTRICT COURT ORDER DENYING MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

79 Civ. 139 (VLB)

Plaintiffs

- against -

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, State of New York,

Defendant.
----------X

VINCENT L. BRODERICK, U.S.D.J.

Defendant's motion to dismiss the above-captioned action is denied.

Pursuant to Rule 19(a), Fed. R. Civ. P., the Commissioner of Education of the State of New York shall be joined as a party defendant. Plain-

tiff shall, within ten days from the date of this order, serve and file an amended complaint joining the Commissioner. Plaintiff and defendant, respectively, shall serve upon the Commissioner a copy of all papers filed by each of them in this action, and plaintiff shall advise the Commissioner of the date set for the hearing on plaintiff's motion for a preliminary injunction.

SO ORDERED.

Vincent L. Broderick,
U.S.D.J.

Dated: New York, New York
August 22, 1979

TRANSCRIPT OF DISTRICT COURT
PROCEEDINGS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
79 Civil 2139

----------x

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, etc., et al

Defendants.

----------x

Before:
HON. VINCENT L. BRODERICK
District Judge

New York, September 26, 27, 28, October 5, 1979

NANCY ROWLEY - TESTIMONY [71]

Q What is your name?

A My name is Nancy K. Rowley.

Q What is you occupation?

A My occupation is a housewife and a volunteer community worker.

Q What is your relationship with Amy Rowley?

A I am the natural mother of Amy Rowley.

Q Are you a teacher of the deaf?

A Yes, a certified teacher of the deaf.

Q Would you state your educational background and experience with deaf children?

A My educational background in early years was growing up in a private school and I attended Gallaudet College where I received a

degree in economics and my master's in education of the deaf. And I've taught deaf children in the State of Pennsylvania and in New York.

* * * [73]

Q How often do you work with Amy on her school work?

A I work with Amy about one hour each day and I think many parents do work with their children, give supplemental work for their children.

* * * [74]

Q What did Amy say to you when she came home from school on April 25th?

* * * [75]

A On April 25th she came home from school very unhappy and confused. She said, "Mommy, please tell me I'll still be in school."

* * *

CLIFFORD ROWLEY - TESTIMONY

* * * [93]

C L I F F O R D R O W L E Y, called as a witness by the plaintiffs, being first duly sworn, testified as follows through the sign language interpreter: DIRECT EXAMINATION

BY MR. CHATOFF:

Q What is you occupation?

A I am a research chemist working for a company called Lanza, Inc. in Fairlawn, New Jersey.

Q What is your relationship with Amy Rowley?

A I'm her natural father.

Q Were any portions of the program designated Exhibit No. 7 at the hearing on December 20, 1978 added or amended at your request? That is the program that the school district designates as the IEP for 1978-1979.

A No.

Q Were you provided with an opportunity to provide any input in the drafting of that program?

A No.

Q And as far as the IEP prepared by the school for 1979-1980, were any portions of that program added or amended at your request?

A No.

Q Were you provided with an opportunity to provide any input in the drafting of that program?

[94]

A No.

Q As far as Amy is concerned, this school year does she have a teacher of the deaf or a speech therapist?

A No, she doesn't have it

this month. Since the school year last year?

A Yes.

[94]

* * *

DR. ANN BARBARA KLIGERMAN-TESTIMONY

Q Please state your name.

A I am Dr. Ann Barbara Kligerman.

[95]

Q And what is your occupation?

A I am chief of the speech and hearing center at Westchester County Medical Center. I am an audiologist by profession, practicing audiologist.

Q Please tell us about your educational background and experience with deaf children and deaf people.

A First of all, for my education, I have a doctorate of education granted to me by Teachers College, Columbia University in

audiology and speech pathology in 1978. I have a master's degree in audiology and speech pathology granted in 1962 from Syracuse University and a bachelor's degree in 1961, also from Syracuse University, magna cum laude.

I've taken postgraduate courses in workshop. I am presently the chief of the Speech and Hearing Center. Among my duties are doing pediatric audiological workups, hearing aid consultations, planning and participating in treatment programs for deaf infants and their parents, counseling of parents and their families, all rehabilitation and hearing aid orientation for children and adults. I participate in multidisciplinary conferences and act as consultant for educational planning for hearing-impaired children.

* * *

[101]

Q Is Amy Rowley deaf?

A Yes. Amy is deaf.

Q Please tell us something about the tests you conducted to determine that Amy Rowley is deaf.

A Okay. Before I spoke in generalities. Now I'll speak in specifics.

One way to see that Amy Rowley is deaf -- well, the first way, according to my definition, is that the hearing impairment precludes --

MR. KUNTZ: I object. He asked her what tests she conducted. It seems to me that that is not the answer that she is giving.

THE WITNESS: I'm giving the definition of deafness and now I will list the tests.

MR. SHERMAN: May we have a ruling from you?

THE COURT: Yes. Wait until I've ruled, when there is an objection.

The question is what tests you did to determine whether or not she was deaf.

THE WITNESS: Okay. The test consists of a pure tone sensitivity test, speech reception test and speech discrimination tests.

The pure tone test indicates that Amy, although [102] she hears the very, very lowest frequency at 250 hertz, at the level of between a mild and moderate impairment, once you go above that into the speech frequency range her hearing level is at the best 80 dB to 90 dB in each ear at 500 hertz and

continues to worsen until there is no longer any responses for either ear beyond 4000 hertz.

In other words, her hearing sensitivity, the softest sound she is able to hear in the speech frequency range is at the level between 80 and 110 decibels, probably beyond that, which puts her in the range of being deaf, classifies her, categorizes her as a deaf child. Okay?

The speech detection thresholds are considerably better than one would expect, but that is reflecting the better hearing at the very, very low frequency of 250 hertz. When you come into speech understanding, whereby she has to repeat the word -- the speech detectio.. nly her raising her hand that she has heard some sound. The

sound that is being delivered are words, but she is not understanding them.

When she is asked to repeat two-syllable words, she is not able to do this in either ear until it reaches the intensity level of 85 to 90 dB. Remember, normal hearing, a normal hearer would hear around 15 dB.

And for the speech sound discrimination, that

[103]

test -- we have many different test scores for it because, as we tested Amy using the test materials that are available to us for speech sound discrimination, her discrimination improved, and the reason it improved is because we were using the same test over and over and she really learned what was on that test.

MR. KUNTZ: Your Honor, I

object. This is to the point now where it is just a narrative without questions, and the question I think that was asked is "What tests did you give her?" We now have an interpretation of this test coupled with an explanation for the variances.

It seems to me that we have got to proceed in some sort of order, asking questions and getting responses.

THE COURT: All right. Let's not go back but attempt to keep your answers responsive to the questions, please.

THE WITNESS: I guess we have to use speech discrimination because that is a measure of understanding speech. You are asking me if she is a deaf child.

MR. KUNTZ: I don't know

what the question there is.

THE COURT: There is no question pending now.

A question, please, Mr. Chatoff.

MR. CHATOFF: I am asking Miss Kligerman to

[104]

explain the tests performed on Amy Rowley. I don't know as much about tests --

THE COURT: You are now being asked to explain the tests. Will you explain the tests that you gave to Amy?

THE WITNESS: I would like to go to the speech discrimination tests because that is --

MR. SHERMAN: I am going to object to the form of the question. It is too broad.

THE COURT: Overruled.

THE WITNESS: The speech discrimination tests are to determine how well one discriminates speech. I did this in several different ways with Amy. One way is to do it without her hearing aid, without any amplification. Without any amplification at all, Amy's speech sound discrimination is very low. This has been shown in the Gallaudet test results as well as mine.

Then we put on her hearing aids, and depending upon which test you use, you get a different score. With both hearing aids worn at the same time, on the WIPI test, which has been mentioned before, the most recent score we got on A-y was 80 percent. Now, that may sound very good, except I would like you to know that this

 [104]

test consists of Amy identifying one out of six pictures. It is a closed set. It is not just saying words where she has no reference.

[105]

The pictures are right there and she has been given this same test at our center and at Gallaudet Center over a period of two years.

Therefore, I switched to a test she had never taken, and I switched from my own speech, which Amy is very familiar with, to a tape, a commercially available, calibrated standardized test recording of the Goldman, Fristoe, Woodcock test -- discrimination test, and with both hearing aids she scored a 73 percent, which puts her, compared to normal hearing children, in a very low percentile. If I could look at my

notes, I could tell you what percentile it is, but I don't know if I am allowed to do that.

You know, she is just like in the 7th percentile. A normal hearing child -- a seven-year old normal child would understand a hundred percent of those words. But with her hearing aids on she only scored a 43 percent. And when she put noise into this system, because the test is also --

MR. KUNTZ: Your Honor, I have to object. The problem with this kind of narrative is that now we get different information. First it is 73 percent. Now it is 43 percent. It doesn't enable me to consider the information that I'm getting in relation to a question that is asked. It is a very difficult way to proceed. I understand the problem

that we are trying to address by proceeding in this

[106]

way, but I wonder if we might break it up occasionally with a question so that I know what the answer is in response to.

THE COURT: She is explaining the various tests which were being used. At the present time she is explaining the tests that were given with Amy having both hearing aids on at the same time.

MR. KUNTZ: Did she refer to the WIPI test at this point?

THE COURT: No. She said on the WIPI test she got 80 percent. Then she moved to something else.

And was this also the WIPI test?

THE WITNESS: No. I

mentioned it. I said the Goldman, Fristoe, Woodcock Auditory Test of Discrimination. That was the test using a tape rather than my voice.

THE COURT: You said that it was 73 percent then and then you mentioned 43 percent.

THE WITNESS: No, no. It is 43 percent.

THE COURT: Not 73 percent?

THE WITNESS: No, no. I'm sorry. Shall I go on?

THE COURT: Yes.

THE WITNESS: With the same test, but a different list of words, when you put noise into it to try to

[107]

simulate the classroom situation, which is very difficult in a test situation, if you put noise into it, her discrimination score deteriorates

to 27 percent, which is as good as chance, because this is also a picture identification test. There are four pictures to a page, and she has to pick out the one that is presented, at a normal intensity level.

Then we wanted to see what happened when we provided visual information, what happens to Amy's discrimination when you allow her to see you lips. So we used the Utley Lip-Reading Test. She had both hearing aids on, she could see my lips, and she scored a 58 percent. That means out of 31 sentences - such as "good morning--I'm giving you examples of the kind of things on the test -- "good morning. How are you? What is your name? Do you want a cup of coffee?" - she scored 58 percent.

When we repeated the sentence,

when we did it a second time, she was able to improve her score to 84 percent. When Mrs. Rowley was asked -- allowed to present the sentences at the same time, and this was a different set of sentences, using sign language, Amy scored 100 percent.

I am not supposed to give any interpretations. Those are my most recent test results.

Q Are you finished?

A Yes.

Q Continue.

A Well, I don't know -- you know, I finished giving my test results.

THE COURT: The last question has been answered. Next question.

Q I would like to know when you started testing Amy Rowley.

A In 1974, May. That was the first time I saw her.

Q In the ensuing five years have you coordinated your testing with testing at the Thornberry Clinic at Gallaudet College in Washington?

A Yes. I knew Amy was going to Gallaudet the first time for the learning vacation. They routinely test their children there and I always maintained communication with them over -- to see, to verify, it is nice to have a second opinion about test results, any changes and that kind of thing. In fact, I have TTY transcriptions of conversations, which I don't have with me. But that's how we communicated as well. I have all their reports. They have all of mine.

* * *

Kligerman - Direct [109]

Q You were discussing before the Utley Lip-Reading Test. You stated that Amy understands 58 percent when she uses amplification and lip reading.

What effect would there be on that 58 percent

[110]

figure if she is not familiar with the contents or the lighting is poor, there is background noise, group discussion rather than a one-to-one discussion, and a person with poor articulation or poor facial features?

What would be the effect?

A That score would go down. Her ability to discriminate speech comprehension would definitely go down in those adverse conditions.

Q What you are saying is that Amy at the very maximum understands 58

percent --

MR. SHERMAN: I am going to object to the form of the question as to what she understands. She can testify to her opinions based on a hypothetical question, but I haven't heard that. I haven't heard anyone ask that.

Q It is your opinion that 58 percent represents her maximum --

MR. SHERMAN: Objection. He is leading the witness. He can ask her if she has an opinion and then she can give it. He is leading the witness, your Honor.

THE COURT: Do it that way.

Q What is Amy's maximum comprehension level and what effect would there be on that comprehension level if any one of several conditions did not exist?

MR. SHERMAN: I object to the form of the

[111]

question, you Honor. That question does not make sense. What are the factors involved?

THE COURT: If he puts the factors in, you will then object that he is leading the witness.

MR. SHERMAN: He can give a hypothetical.

THE COURT: He need not give a hypothetical. We are in federal court. He need not give a hypothetical.

What in you opinion is the maximum level of comprehension which Amy has achieved?

THE WITNESS: That depends on what you are giving her. If you are doing it by -- only letting her

hear what you want her to repeat back and discriminate, then it is going to be very, very poor. If you are going to let her see visual clues, only speech reading and hearing, it is going to be better, let's say 50 to 60 percent. But that, of course, also depends upon the lighting in the room, the way -- I speak very easily for someone to read my lips; not everybody does -- whether or not someone has turned away, whether she is familiar with your way of speaking, whether she knows the context in which you are talking. If you give her a page with pictures to point to, it will be easier than saying, "Okay, repeat the word 'ash'," out of the clear blue sky. So there are lots of things that go

And if you are giving her a toatal communication approach, where she is hearing and seeing your lips and reading the signs, then she is going to be able to discriminate and repeat back and understand what you are saying to the level of her mental ability.

* * *

Kligerman - Cross

* * * [137]

Q Does the WIPI test that you administered test word comprehension?

A That depends on what his definition of

[138]

"comprehension" is.

Q Well, let me go back, because you agreed with me, I think, during the initial questioning that you pay particular attention to words and to their meaning. And in the report that you submitted you said that the WIPI test measured speech discrimination. Is that correct?

A That's correct.

Q I asked you, and I'll ask you now, is there a distinction between speech discrimination and comprehension of speech?

A Yes, there is.

Q Now, the WIPI test, did that measure speech discrimination or did it measure language comprehension?

A It measures comprehension.

Q Would you tell us how it measures comprehension and what you mean by "comprehension" in that context?

A Because the child has to (1) be able to discriminate --

Q I'm asking you for a definition. It may be a textbook definition, it may be your own definition, but it is a definition.

How do you define "comprehension" as you have used it in that context?

A Comprehension is the understanding of the

[139]

language.

Q Just prior to this you told me that there is a distinction between comprehension and speech discrimination and that the WIPI test measured speech discrimination. Are you now telling us that the WIPI test measures comprehension?

A The WIPI test measures comprehension, which includes discrimination.

Q Is discrimination a subset, to put it mathematically, of the word "comprehension"?

A This is something that has been argued in the books over many years. It is very difficult to separate out discrimination from comprehension and comprehension from discrimination, and that's why their discussion becomes so difficult.

Q It would seem to me, then,

test, as you stated in your report, of speech discrimination would atttempt to utilize that end of the spectrum of the controversy, would it not, to focus upon word discrimination? There must be tests, Dr. Kligerman, that measure word comprehension, aren't there?

A Yes.

Q What tests are those, by the way?

A You have other kinds of tests in speech

[140]

language pathology --

Q What tests measure word comprehension?

A Vocabulary tests, the picture vocabulary test, the Peabody picture vocabulary test.

Q Would a school test measure

vocabulary comprehension?

A I'm not familiar with your school tests.

Q Would a schoolbook vocabulary test measure comprehension?

A Yes.

Q So consequently, if one were to do well at a school vocabulary test, one could then be said to have a good understanding or good word comprehension, is that correct?

A I guess you could.

* * *

MARTIN L.A. STERNBERG-TESTIMONY [152]

Q Please state your name and occupation.

A Martin A. L. Sternberg is my name. I am a professor at New York University, at the Deafness Research and Training Center.

Q Please state your

educational background and experience in the education of deaf children.

A I am a graduate of the City College of New York with honors in English and have a Master of Arts degree from the American University in Washington in the field of communications and I am expecting to receive my doctorate in about two more months in the area of deafness rehabilitation from New York University. [153]

I have been working for the last 31 years in the area of deafness rehabilitation, deafness education and work with deaf children who have learning disabilities in addition to their deafness, and I have also written extensively in the field and I am the author of 21 books and articles on the subject of my interest.

Sternberg [153]

But my prime concern is communication insofar as it pertains to deafness.

One of the sub-areas of my interest touches on communication with interpreters, like we have before us. One of my ocntributions to this field is a standard curriculum for the training of interpreters. This is used throughout the United States as a standard reference.

I served or continue to serve as a consultant to approximately 15 schools for the deaf. In addition, I have been for the last five years an educational consultant to the Texas Education Agency, involved with the evalution of their ongoing curriculum for the deaf children of that state.

I am also a member of the Board of Trustees of St. Francis de

Sternberg [153]

Sales for the deaf in Brooklyn, New York.

* * * [154]

Q Please define "total communication."

A Total communication is not merely a method of communication but rather a philosophy of communication. Its primary consideration is the individual deaf child and his or her educational needs. The philosophy behind total communication mandates that the individual child's specific needs be accounted for in the design of a program for that child's education.

This can but does not necessarily include the following: oral communication, which means speech and speech reading with or without auditory amplification; writing on the

Sternberg [154]

blackboard or on paper; finger spelling and one or another form of sign language. All of these together we call total communication.

Q I think it would be helpful if you explain the difference between sign language and finger spelling.

MR. SHERMAN: Your Honor, I am going to object

[155]

to this line of questioning as not in any way relevant to the matter before you. We are talking here about the educational placement of a particular child. It is clear to me that we are now about to get involved, apparently, in a debate between total communication, and we have heard it before, oral communication.

This is not the forum for such a debate. Again, the Commis-

sioner of Education was concerned with the education of this particular child.

THE COURT: I will overrule the objection, Mr. Sherman.

MR. CHATOFF: Can you repeat the last question?

(Question read.)

A Finger spelling consists of 26 separate and discrete positions of one hand. Thus the letter A is indicated by the thumb placed against the closed fingers. The B, the thumb is placed against the palm with the four remaining fingers sticking up in the air, and so forth. Then the alphabet has a specific hand position.

Finger spelling is used for the purpose of providing a visible equivalent to the English language or any language, for that matter, by

providing a letter-by-letter continuum, showing what the word looks like on the

[156]

fingers. As opposed to finger spelling we have sign language, which today is a broad rubric describing one or another of various systems' gestural language which might pertain to ideas and concepts, phrases, sentences, individual words and so forth.

As an example, when we make this movement (indicating) involving the closed fists moving back and forth in rhythm, obviously we are referring to some kind of an activity. In this particular case we are talking about driving a car.

Many of the signs we use are eyechanic, meaning they describe the shape of the idea.

On the whole, the sign language today is used for the purpose of providing a visible method of expressing. It can be used isolated or, in the case of total communication in conjunction with spoken language. When it is used with spoken language, we have what we call total communication.

* * * [ ]

Q What effect does the use of total communication have on camaraderie and interaction between deaf children and hearing children?

A Total communication, because it involves sign language, in a classroom context, for example, will sensitize hearing children to the needs and special requirements of deaf children. Through becoming sensitive to these needs they will be more

 [159]

responsive to an understanding of the specific nature of hearing loss.

Hearing loss per se is not a visible disability. It is invisible. A deaf person on the street cannot be identified as, for example, one can identify a person with cerebral palsy or a paraplegic. Because we cannot identify

[160]

visibly a disability, we sometimes lack understanding. Thus, by the introduction of total communication we make deafness visible and therefore we achieve a joint step forward toward empathy and understanding.

* * * [167]

THE COURT: Do you know Amy Rowley?

THE WITNESS: Yes, your Honor. I spent Tuesday night for

hours with the child.

Q Please tell us which papers you reviewed.

A If my memory serves me correctly, I have

[168]

received the Davila affidavit, the one by Deninger, by Mary Sheie, several reports from the audiological department at Gallaudet College, and one or two from the Westchester County Medical Center, and have them all in my briefcase, approximately nine documents.

Q Are you aware of, do you know of, the recommendation of the Committee on the Handicapped?

A Yes.

Q In your opinion, does Amy need an interpreter in her classroom?

A Most definitely, yes.

Q What do you think about the present arrangements?

A I think that is a sad commentary on a school system that it would permit a situation whereby a so-called mainstreamed child is receiving the equivalent of one hour a day of special assistance from a resource teacher, three hours a week of speech therapy, and the remaining six hours a day with no supportive services whatsoever.

Sternberg - cross

* * * [171]

BY MR. KUNTZ:

Q Dr. Sternberg, you told us that total communication is a philosophy of approach. Is that correct?

A Yes.

Q I take it that when you characterize it as a philosophy, it is not then a method.

A Correct.

Q As a philosophy, has it received unanimity of acceptance among educators of the deaf?

A Since its introduction approximately 15 years ago, 50 percent of the schools for the deaf have adopted it and the number continues to increase steadily.

Q If there is a parallel philosophy or another philosophy, what is that other philosophy called or how is it named?

[172]

A I would say how is it named. It is not a philosophy. The others are called methods. We have an oral method, the combined method or the simultaneous method. They go by all kinds of specialized jargon, but they are all methods of actual presentation in a communicative sense. They are not philosophies, however. Therefore, there are no others that are called philosophies per se.

Q Are you then telling us that there is no oral philosophy?

A Not in the same sense as there is a total communication

philosophy. We are talking now in terms of semantics.

Q Yes, we are. And I wonder if you aren't reluctant to dignify the other approach with the nomenclature of philosophy and by that device downgrade its importance.

A No. Such is not the case, because the total communication philosophy obviously was introduced as a philosophical construct involving other methodologies, namely the oral, the manual and the combined together with written communication and auditory amplification. All of these are per se methods.

The premise behind the total communication

[173]

approach is a philosophical one insofar as it would encompass all of

these other methodologies. I did not mean to imply I was trying to downgrade any one or another of the previously mentioned methods.

Q Is there any situation under the total communication philosophy where you have a profoundly deaf child where a sign-language interpreter or an interpreter would not be absolutely required in the classroom of a first-grade child?

A Not to my knowledge, sir.

May I amend that remark?

Q You described the interpreter as a communicator.

A Yes.

Q In a classroom situation, is the interpreter a conduit for information?

A Yes.

Q As a conduit for information

--

A Yes.

Q -- does the interpreter impart the meaning of the information which is transmitted?

A Yes.

Q Dr. Sternberg, if the sign-language interpreter were to finger-spell a Spanish word and there was no

[174]

child in the classroom, deaf or hearing, who understood Spanish, how would the sign-language interpreter communicate the meaning?

MR. HARTZMAN: Would you repeat that question?

(Question read.)

A Assuming there was a need to do so, and assuming that the interpreter was familiar with the

Spanish language, the interpreter would then offer a simple translation of the word in English.

Q That is not my point, Dr. Sternberg. My point is that the interpreter is not a teacher but merely a communications device. Do you agree with that?

A Yes, I do.

Q Have you ever visited Amy Rowley in her kindergarten, first grade- or second-grade class?

A No, I have not.

Q When was the last time that you were in a mainstreamed primary school classroom for the purpose of observation?

A Approximately four years ago.

* * * [177]

Q Well, if the philosophy is

that communication must be established, would it not follow that signs or signing would not be necessary when the child can orally understand what is being communicated?

A Again I do not understand the thrust of that question. I am confused.

MR. SHERMAN: Your Honor, do you understand that question?

THE COURT: I am not on the witness stand. The witness says he does not understand the question.

MR. SHERMAN: Yes, your Honor.

MR. HARTZMAN: Would you read just the last couple of lines of that question?

MR. SHERMAN: I'll withdraw that question.

Q If a child fully understands

what is being orally communicated, a deaf child, would it not follow that

[178]

signing is not only unnecessary but distracting to the child?

A No. May I elaborate on that?

Q No.

THE COURT: No.

Q (Continuing) What purpose would the sign language serve in that case?

A In that particular case, none. But there are many variables involved. The child may have been coached by rote to comprehend a certain sentence.

Q Thank you.

Isn't it true that in some cases that signing, or sign language, could act as a distracting influence?

A No.

* * * [180]

Q Why was your meeting arranged the way it was rather than having you observe her in a classroom?

A My meeting was a social meeting with Amy. It involved her parents. We happened to meet at a social function and thereafter we went out for ice cream and then I had opportunity to communicate with her.

Q Did your meeting with her that way have anything to do with not wanting to make her feel that she was constantly under observation by someone?

A Yes, very much so. My work with young children has made me very cautious during the observation process. I try to be as discreet as possible, and so I seized this

opportunity to use a social occasion to observe

her so that she would not be aware that she was being observed.

* * *

TARAS DENNIS-TESTIMONY [95]

Q Please state your name and occupation.

A I am Taras B. Dennis. I am a guidance counselor at the New York School for the Deaf in White Plains, New York.

Q Please recite your educational background and experience in the education of deaf children.

A I have it all on my resume. Can I read it?

THE COURT: Very well.

Q Tell us just a little about your education.

A I got my BA from Gallaudet College with distinction in 1950, my MS from Hunter College in 1963, my MA from Columbia University in Special Education in 1971, and an Ed. M from Columbia University in 1973.

MR. CHATOFF: I would like this resume marked in evidence.

(Plaintiffs' Exhibit 22 marked for identification.)

MR. SHERMAN: No objection.

MR. CHATOFF: I move the resume be received.

[194]

MR. KUNTZ: No objection.

THE COURT: It will be received.

(Plaintiffs' Exhibit 22 was received in evidence.)

Q I would like to read a statement to you from federal legislation that is now before Congress, the Department of Education Organization Act, printed in the Congressional Record of Friday, September 21, 1979.

MR. SHERMAN: I don't

understand what is going on. Is he asking the witness something about that?

THE COURT: Not yet. He is going to read a statement from it and then presumably ask the witness a question about that statement.

MR. SHERMAN: I see.

THE COURT: Proceed, Mr. Chatoff.

Q "Among the findings written into the legislation, finding No. 3, 'Parents have the primary responsibility for the education of their children and states, localities and private institutions have the primary responsibility for supporting that parental role."

I would like your opinions and views on the substance of that quote.

A Well, as I see it and I read it in good English, I support it very much because my job in the

[195]

School for the Deaf now is connected with working with the parents, and I notice that the deaf children with the least worries are those who have parents with the most worries. And so I really firmly believe that when a parent is involved in a deaf child's education good things can happen.

Q Are you saying that parents and schools have to work together?

A Absolutely. There is no better way.

Q Do schools have to support the decisions made by parents on how to raise their children?

A I would say so.

Q Tell us about your personal

knowledge of Amy Rowley.

A Well, to be honest with you, I have taught her husband, who was my former pupil in the School for the Deaf in White Plains and I keep good track of all my former students and I know Amy very, very well. I know that she has a brother and I've practically been in their home many times socializing and I've seen the child grow up there.

Q I think you've covered it, but Amy is now seven years old. How many years have you known Amy?

A Well, I wasn't exactly there when she was born, no. But I could say from that point on I've known her

[196]

all her seven years.

Q What is your opinion of

Amy? What do you think about her?

A A beautiful, bright child, and with her personality -- well, excuse me for a minute. I'm very involved with children myself, and when Amy sees me I play a lot with her. We tease each other. She is really very, very bright and she has a lot of potential.

Q What do you think about the way Mr. and Mrs. Rowley have raised her?

A I have no complaints. I think they are perfect, ideal parents for her. They are always concerned with her future. I've never seen any two parents more interested in their child like Mr. and Mrs. Rowley.

Q Have you reviewed any records, any school records of Amy's?

A Yes, I have.

Q What records?

A I have a list in my jacket, if I may read it.

Q I would like you to read it.

A Well, I've read the report from Gallaudet College of the audiologic clinic of February 20, 1979; the report from Gallaudet College audiologic clinic of April 24, 1978; the report from the Westchester County

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Medical Center Speech and Hearing Clinic, June 22, 1978; the recommendation of the Committee of the Handicapped of the Hendrick Hudson Central School District; and I've read some evaluations by Mrs. Gloverman and Miss Sue Williams and Miss Garzione. And also I read a February 2, 1979

observation by Miss Mary Sheie, a February 15, 1979 observation by Mr. Michael L. Deninger, and an excerpt from the 1979-80 IEP prepared by the Hendrick Hudson Central School District for Amy Rowley.

Q In your opinion, does Amy Rowley need an interpreter in class?

A Absolutely.

* * * [198]

Q Can you see any detrimental effects on Amy if the present arrangements are continued?

A Well, I've always believed the most important years of a deaf child are when that child is very young. It is important to start the right first step. So maybe while she is young Amy will not have many problems at first. But as time proceeds, the gap of communication

Dennis - Direct [198]

gets further

[199]

and further apart and problems that could be social, cultural, psychological, not just academic, start to set in.

TESTIMONY OF NORMAN DOCTOR

* * * [241]

Q And under what circumstances did you see her?

A Mr. Cortez and I rode up to the school. We sat and talked with the principal for a while, went in to observe her in her classroom, and observed her in a reading lesson with a group of children and the teachers. Then we sat and we talked with her for a little while and went back to the office and reviewed the educational materials that were in the child's folder.

Q Did you sit and talk with her in the classroom?

A Yes, we did.

Q When you first arrived at the classroom that Monday, what did you see when you first entered the

classroom?

A We saw Amy Rowley sitting at a table with the teacher, a reading lesson going on. I observed that the child was seated with the window to her back, which is important in terms of working with a hearing-impaired child. The light from the window was on the other students and was not shining in Amy Rowley's face in terms of blocking her

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ability to lip read.

The child was using an auditory training unit. The microphone from the auditory training unit was passed to the other students as they read from the story.

Amy, from all observations, was keeping up with the reading lesson and participating fully with the other

children.

Q When you say that she was participating fully with the other children, would you describe what you saw and observed?

A Okay. Again, she was watching both the book and the children when they were reading and keeping up with the reading lesson. After the reading lesson was finished, they were preparing to go to lunch, and Amy stopped to talk with her friends, she was interacting very nicely and very easily with the other students before they went to lunch.

Q Did you have a chance to observe her at any other time?

A Other than after the lesson was finished, when Mr. Cortez and I were speaking with her?

Q Yes. Would you tell us -- I

meant to ask you, would you tell us what transpired or what occurred when you and Mr. Cortez spoke to Amy?

A Mr. Cortez and I just had a general conversation

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with her, asking her questions about school, asking her about various objects in the room. Basically we were trying to get an impression of her speech and language abilities and of her signing abilities.

Mr. Cortez -- and I need to specify this -- signs, but he is not an interpreter. This was a very primitive screening that was taking place, not an evaluation.

One of the things that we did was I asked Amy to attend to me while I told her a little story, and I had Mr. Cortez sit close by and he

signed the story at the same time that I was telling her the story.

Amy attended to me as the speaker rather than attending to Mr. Cortez while he was signing, and at one point, when I intentionally went very fast, to see if I could confuse her, she stopped me and asked me to repeat what I said rather than looking at Mr. Cortez, who was signing, to see if she could catch it through the sign language.

And also I have to specify that the language we were using was very simple conversational language.

Q From that brief experiment did you draw any conclusions?

A I would have to say that it is very difficult to draw any conclusions in terms of the issues that are

taking place here. Whether in fact Amy would have been able to follow in an instructional lesson with new vocabulary being introduced as compared to the simple conversation that we were having, I could not testify. I would certainly have to mention that Amy is a good lip reader. We tried various things, moving around the room, speaking to her from about 20 feet away. She has good lip-reading skills and I believe, from that small observation, that she can function aurally within that classroom and would attend to the teacher when the teacher was speaking. But it was a very primitive screening evaluation.

Q When you say that Amy could function aurally in that classroom,

does Amy receive any other clues besides those provided from her attention to the teacher's lips and through the FM wireless as to what the meaning of a particular spoken phrase is?

A In terms of the auditory oral communication?

Q Yes.

A Okay. Yes.

Can I just explain some aspect of auditory oral communication?

Q Please do.

A Auditory oral communication does not mean that a deaf child just receives communication from the movements

[245]

of the lips in isolation by itself. It also does not mean that the child uses the residual hearing that he or she has just by itself. I mean that

the child uses the hearing, the residual hearing that she has plus watching the lips, plus watching facial expressions, the context of the situation that is taking place.

There are all kinds of visual and auditory stimuli that are helping the child interpret the language and figure out the situation that is occurring.

It is my belief that Amy can function adequately and appropriately in that manner.

I also have to add, on the basis of the audiogram that I was shown -- I don't want to get too technical, but Amy has a good island of residual hearing in the low frequencies. All sounds are divided into frequencies. The vowel sounds, which are the sounds that are most

difficult to lip read because they are not on the surface of the lips, are the sounds that she is most likely to hear. The high-frequency sounds, which is where her most severe part of her hearing impairment is, are the sounds that would be most easy, easiest to see. So that in terms of using her residual hearing and using her lip-reading ability, based on the audiogram and based on my impression of Amy, I feel that she would be able to function appropriately in an auditory oral approach. [246]

* * *

* * * [253]

Q When you observed Amy in class, that was Monday, the 17th?

A That is correct.

Q September 17th?

A Yes. I don't know my dates. What was this past Monday?

THE COURT: The 24th.

THE WITNESS: I'm sorry. September 24th.

Q The 24th? This week?

A Yes, this past Monday.

Q When did you review the records of Amy Rowley?

A At the time that we were at the school.

Q How long did your observations last?

A Twenty minutes.

Q The observation lasted 20 minutes. How long did the conversa-

tion with Amy Rowley last?

A Ten minutes.

Q You met with Amy with a Mr. Cortez. Was total communication used at that time?

A Are you talking about by me or by the classroom teacher?

Q When you met individually with Amy, Mr. Cortez, Amy and you, was total communication used during the

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discussion?

A I'm not sure I would agree with total communication being used. I don't think I would define it that way.

Mr. Cortez, who I mentioned before, is not an intepreter and as far as I know is not proficient in sign language, did sign to Amy for part of the discussion.

TESTIMONY OF ED CORTEZ

* * * [271]

CROSS EXAMINATION

BY MR. KUNTZ:

Q Mr. Cortez, on what do you base that opinion?

A Could you just remind me of which opinion?

Q You just testified that in your opinion Amy does not require a sign-language interpreter in the classroom at this time.

A Okay.

Q And I would like to know the basis of that opinion.

A Okay. There were several things in both the information that was presented to the Commissioner and to the impartial hearing officer and information in the records and things that occurred during the observation

that helped me come to that opinion.

I think foremost in my mind was the statement by the interpreter that Amy had, and this comes from the documentation of the impartial -- I believe the Commissioner's appeal. He stated that Amy did not attend to him when the teacher was speaking and when he was interpreting for the teacher. There was a man by the name of Mr. Janik. And I

[272]

have to -- in the entire thing, he said that he did not feel that an interpreter was needed and that he was not serving any real function in that particular situation. I am paraphrasing, but that was basically what he said.

So that is really foremost in my mind, and that is one of the

things. I have to assume that he knows what he was talking about and that as an interpreter of the deaf he had a basis on which to come to that conclusion.

The other thing that indicated to me that the placement was appropriate was the fact that she appears to be doing well according to all the records that were in her file, well for a first grader either hearing or deaf. Her report card shows that she had received either excellent or good during the past year. The SAT scores, the Metropolitan scores, they all pointed to a child who was succeeding very well in that particular setting.

In terms of the observation, I saw nothing to contradict that. The child did not appear to lose track of

what was going on during the time that we observed her. During the reading lesson she followed the -- excuse me. This is somewhat distracting. Is it possible to pass that around?

Q I'm sorry. I am sorry that you were interrupted.

[273]

A During the course of the observation, she in fact was able to follow the directions that were given to her in terms of when to read. She was very much aware of where they were in the reading lesson. She was able to begin on cue. She read at a normal pace, with good volume and good intonation.

I observed her after the lesson, and after the lesson she was told to go back to her desk. Actually, the group was told to go

back to their desks. The children went back to their desks.

A kind of interesting thing happened after that. They were told to put away their books and get ready to go to lunch, line up to go to lunch.

Now, you would expect a child, any child in that kind of situation to just get up and go to lunch. And that's kind of something that children are cued to do. In this case, however, Amy interrupted the teacher and asked the teacher if she could, instead of getting ready for lunch, finish her written lesson, and the teacher sort of chuckled and said, "Yes, you may, if you can do it quickly." And Amy promised to finish before the other children were ready. The other children proceeded to put

their books away, start lining up, and in fact by the time they all lined up, Amy had finished her lesson, put her books away and had gotten in line. [274]

So that it was a matter in which the specific direction of the teacher was being countered -- in other words, Amy was assertive enough and understood enough what was going on to counter that direction, asked if she could do something else, and then proceeded to do it, and essentially fulfilled her part of the deal, which was to finish on time and be ready with the other children.

Q As a result of your review of the records and your observation in the classroom, would you say that the district's approach of mainstreaming this child, with the supportive services that were in place and are to

be in place by virtue of the recommendation of the Committee on the Handicapped, make this a successful second-grade program for this child.

A I would anticipate that it would be a successful second-grade program for the child.

MR. KUNTZ: Thank you. I have no further questions.

* * *

Q Are you certified as a teacher of the deaf in New York State?

A I am CED certified.

I'm sorry. That's not correct. I forget

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whether it is CAID or CED certified. It is Council of American Instructors of the Deaf or Council of Educators for the Deaf. I forget what it is.

Q I don't know what the abbreviations mean. What does CAED stand for?

A CAID is Council of the American Instructors of the Deaf. And CED is Council of Educators of the Deaf.

When I graduated from Western Maryland College, it was a program that would lead to

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certification within one of those, and at the time I graduated I received a certification.

MR. KUNTZ: Your Honor, I wonder if we might inquire of Mr. Chatoff how long he is going to be. I made previous commitments upon our agreed-upon schedule of 4:00 o'clock.

THE COURT: All right. I think we will adjourn at this time and continue with the cross examination of Mr. Cortez on Wednesday at 10:00 o'clock.

* * * [291]

Q Mr. Cortez, when we recessed on Friday you stated that you

[292]

have certification from CIAD.

Do you know Dr. Robert R. Davila, the immediate past president of CIAD?

MR. SHERMAN: I am going to object to this, your Honor.

THE COURT: Overruled.

A Your statement is incorrect. I said CAID. And in fact, the certification that I am referring to is CED. Certification, Council on Education of the Deaf.

I went home after the testimony and pulled it out. It is, as I said, CED certification. I received it in September of 1973.

Q Then am I correct in assuming that you do not have CIA certification?

A No, I do not believe I have that, unless it is complementary.

I am not sure what you are referring to in terms of CID certification or CAID.

Q As far as CED certification

is concerned, is your certification provisional or professional certification?

A My certification is Type A, temporary certification. In fact, I called Dr. Rly Stelle in Tucson, Arizona, this past week to check on the status of my certification, and he indicated that professional permanent

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certification would be forthcoming as soon as I sent verification that I had taught in the School for the Deaf.

I also have New York State certification in the area of deafness.

Q Are you certified by the Commissioner of Education of the State of New York?

A Yes, I am.

Q When did you obtain that certification?

A I applied for that certification back in March --

Q I did not ask when you applied for it. I asked when you received it.

MR. SHERMAN: May I have the question reread?

(Question read.)

A Okay, I have confirmation that it has gone through just this past week.

* * *

DR. JOSEPH ZAVARELLA-TESTIMONY [341]

Q You referred to her score in listening comprehension. I believe you gave the score as 5.7. What does that mean?

A It is a grade equivalent, as to the other, and it means that she scored at an equivalent of fifth grade, seventh month.

MR. CHATOFF: No further questions.

THE COURT: I think you are going to have to

[342]

explain that to me.

Obviously, Amy does not listen. Will you tell us what listening comprehension has tested?

THE WITNESS: I see the contradiction in that, your Honor, but listening comprehension with Amy would

be through visual means. Rather than saying the word, the word was signed. See, she received a clue from the teacher, and the youngster then has to respond by selecting the appropriate symbol on this paper. By receiving the signing clues, she then responded on the paper. That was the listening comprehension.

TESTIMONY OF ANN MULHOLLAND [342]

A N N M U L H O L L A N D, called as a witness by the defendant school district, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KUNTZ:

Q Miss Mulholland, what is your present

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occupation?

A I am associate professor of education at Teachers College, Columbia University. I officially retired as of August 1979, but since there has been no replacement for me, I am currently employed on a part-time basis.

Q As a professor at Columbia, do you deal in a specific area in any specific aspect of studies?

A Yes, my specialization for almost my entire professional career has been the field of deafness, and specifically education of deaf children and adults.

MR. KUNTZ: Might I have this document marked for identification.

(Defendant Board of Education Exhibit 7 marked for identification.)

Q Miss Mulholland, I show you what has been marked as District Exhibit 7 for identification. Please tell us what that document is?

A It is my vitae up until a couple of years ago. It is not up until the last minute.

MR. KUNTZ: In lieu of asking Miss Mulholland about her background to any great extent, I

would submit this vitae in evidence.

(Pause.)

THE COURT: No objection, Mr. Chatoff?

MR. CHATOFF: No objection. [344]

THE COURT: Exhibit 7 will be received.

(Defendant Board of Education Exhibit 7 received in evidence.)

Q Would you briefly state for the Court your background, just touching upon your educational degrees and your experience?

A Having lived a long time, I have acquired a few degrees in the process. I have a Bachelor's degree in education, Bachelor of Science in education, a Master of Education, with emphasis on secondary school, a Master of Arts and Audiology earned at

Northwestern University, a PH. D in educational psychology from Fordham University, and an un-picked up list of credits, something like 36 credits in guidance and counseling from Loyola University in Chicago.

In addition, 18 or more credits in measurement, which began early on in my teaching career and was obtained in such universities as Harvard University and Boston University.

Q Would you briefly state your teaching experience?

A I have taught in a day school for the deaf for a few days short of 20 years. I opened up and developed

[345]

a guidance program in that school for the evaluation and counseling of

hearing-impaired children and their parents. I operated a guidance clinic at Northwestern University in conjunction with Dr. Helmer Michael Butts. I also operated a nursery program there. I have studied with Michael Butts, particularly his work in psychology of deafness and his techniques of assessing deaf children and counseling both deaf children and their parents.

I presently, in spite of working five days a week instead of six or seven, I presently ran a program where we evaluate, at the request of parents, deaf children to determine the adequacy of their educational placement and to provide direction for their educational programming. We see children from infancy through young adulthood.

In addition, I am partly

responsible this year for the Master's program in preparing teachers of the deaf. I am relinquishing some of my responsibilities for the doctoral programs in education of the deaf, but I am still advising on dissertations.

Q Miss Mulholland, have you had occasion to see Amy Rowley in a classroom setting?

A Yes. I did visit the classroom. I think it was on September 28th.

Q And approximately what time did you arrive at

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the School?

A I know I was in the classroom by 9:30 and I left the school close to 11:30.

I observed Amy in class and also in the lunch room.

Q Please describe for the Court your observation of Amy and the circumstances under which it took place.

A I observed Amy in a spelling test, a spelling lesson and a math lesson and in a social situation. Even a little bit of physical activity. That was in the classroom.

I made an effort, if I may look at some of my notes, I made an effort to jot down some of the language which she was using in the classroom situation.

First of all, the room was properly lighted so that there were no shadows being cast on the face of the speaker. There was adequate lighting for -- in almost every section of the room. The acoustics of the room was satisfactory. The arrangement was

such that there were rows of tables -- I think there were four rows of tables with about five children in each row. Amy sat between two boys in the front row, in a position which for most of her work would probably be considered advantageous.

The teacher was wearing her microphone. I was impressed with the manner in which the teacher

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operated her classroom. Her strategy, her teaching style is somewhat formal; that is, she requires the children to work efficiently -- as efficiently as possible, and to work quietly, and to respond to questions.

It was my judgment that the spelling test was quite well handled --

Q Miss Mulholland, let me

interrupt. Was the spelling test the first thing you observed?

A That's right.

Q Would you describe that for us, please?

A The teacher said the word from a list of about 10 words, put the word in a sentence, and then repeated the word. Her diction was -- I have a note under this, "Clearly stated." There was no problem as I observed it.

So the first word was "jump," another word was "fun, have, must, bus, cup, gun." She had no trouble with "bus." From what I could see she had no difficulty, and the last word was "from." Because I think they were in context she knew what the word was.

Q Are you saying that you observed Amy specifically in this

spelling test?

A Yes, I watched her responses, I watched the teacher giving her the stimulus, giving her the words, the

[348]

sentence and repeating the words and also her writing the test.

Q Did you come to any conclusions as a result of those observations?

A I felt she was having no difficulty at all in responding to the teacher's words.

Q Would you tell us what you next observed?

A Do you want the lesson?

Q I want it as complete as possible.

A I was pleased to see that while the teacher was going around

checking all of the spelling tests, making sure that everyone was all right, Amy decided to do a little playing. So she took her pencil and put her pencil on her lip and she said to the little boy next to her, "Look at my tongue." Pretty soon, several of the boys around her were playing. This didn't seem to me to be any problem at all.

The papers, I should say, were being collected by the teacher. So this was very natural. She was talking with the children next to her.

Q I was going to ask you, did that exchange have some significance to you?

A Yes.

Q Would you tell us what that significance was

or is?

A First of all, she was not having any difficulty in communicating with the children, either receptively or expressively, and that the children had no difficulty in understanding her. In these situations I observed she had no difficulty communicating.

Q Would you tell us what you next observed?

A I next observed the spelling lesson and I was concerned and paid close attention to the language of the classroom teacher in order that I could determine whether or not Amy was having difficulty. And I was surprised that the teacher used language which was appropriate, the instructions were not too complicated. She did use such a sentence as, "Be sure that we have it

all done." Her language was good, her voice was okay, and she did give commands like, "Circle the "a" sound."

Amy performed and I had not interrupted the class at that time. I was still in the background. And she also was able to respond for a word called "snerks." They were referring to some of these words as s-n-e-r-k-s. These words are snerks, the teacher said. Amy said, "It is a snerk," with proper intonation.

Q As a result of that interchange between Amy and the teacher did you come to some conclusion about Amy?

[350]

A Yes, and in the math lesson as well, I felt that Amy was a fortunate child to have such -- to be in such an educational setting where

the teacher was extremely sensitive to her needs, made sure she understood what was going on. At the same time when at one point Amy was a little disruptive, she put her foot on the foot of the boy next to her, and the teacher reprimanded her. She was being treated properly in that situation.

Q Would you tell us what you next observed?

A The next lesson was on arithmetic. That was very interesting to watch because Amy did so well on it. It was good. Amy had freedom to go to different parts of the room. After they had had their little exercises when the teacher did give some directions, they proceeded to work on math. Amy turned to the boy next to her and said -- to the teacher

and said, "We going to do math?" She might have said, "We are going to do math," but I didn't hear it. I put down, "We going to do math?" It was properly intoned to be a question. Looking at the book she said, "We are going to do math." She was making differentiations between the way she spoke her sentences, indicating to me she was not simply repeating; was not giving off automatic language but producing language about which she was thinking.

Now, the task was --

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Q Excuse me. Was it your testimony she was not giving off automatic language?

A Automatic language would be like the way we talk, "Good morning, how are you," and we respond, "How are

you." I felt she was generating this language. I'm not trying to say automatic language is bad but she was thinking about what she was saying. Some idiomatic expressions might be automatic and those are appropriate. But in this instance I felt she was generating sentences.

The teacher's directions for the accomplishment of this task were good and sometimes a little lengthy. She said, "We are going from the apartment house to each place on this graph," which was blocked off. The children were to find the shortest distance in response to oral questions. We want to find the shortest way. We are lazy. We want to go to the drive-in. How many spaces will be the shortest way to the drive-in?"

Q Are you saying what the teacher's instructions are?

A Yes. "How many blocks did they go?" Amy's hand was first up and she said, "I think I know" and she did know. Throughout all of that she was first to complete the task and she was finally called upon to help some youngsters who were not doing so well on this task.

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Q How did that occur?

A The teacher was behind her, working with a boy who seemed to be having difficulty with the instructions. By the way, each section of the test or each task was introduced by the teacher in the front of the room properly placed. Then she moved around the room to see those who were not solving the problem

accurately.

So she was about three rows behind Amy when she called Amy by name and invited her to come and help this boy who was having trouble.

Q What happened as a result of the teacher's request?

A She called, "Amy," and Amy turned right around. When the teacher said what she wanted her to do, she came right over. As a matter of fact, I think she realized, with the teacher standing there, here was a boy who needed help.

She used language to her neighbor boy, "That's east," when most of the children I heard were having trouble figuring out east and west. One expression she used is, "You are not supposed to do that." Then she used what is truly an intonative

question, "I was smart." Another expression was, "You forgot."

Q Did the use of those expressions have significance

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to you?

A Yes. It seemed to me that for a deaf child with her loss, that she was functioning very well, receptively and expressively, and that she had good knowledge of the structure of language and that she was able to use a variety of sentence forms in a spontaneous manner in a real situation, not a contrived one. I am referring specifically to the questions to the teacher and her relationships to the children.

Q What did you next observe?

A I think about this time -- at one point Amy did say, "What did he

say?" She was trying to find out from the boy next to her what did he say. She was repeating to him, "What did he say?" That was again in a proper question form.

The teacher said, "He said six and he is not right." So this is the kind of conversation that was ongoing.

The next thing that occurred was they had a task to perform which required them to find other names for four, five, six, eight and ten, which was a written task and we would call that a coding task. That was a very interesting thing to see, the manner in which they worked. There was a chart on a page of their arithmetic book and they had to perform certain small simple mathematical problems or

computations, but they had to color them. So the answers had to be color-coded. She operated, I thought, in a very logical manner in that she selected all of those answers which required yellow crayon, and she began to fill in the yellow, color in yellow.

Q Did her response to that test have some significance to you?

A I think she was doing very, very well in math or math concepts. I felt she was not having difficulty in understanding directions.

Q What next did you observe?

A Well, at this time I observed the work of a number of the children because I did not want Amy to think I was there to observe her, to make her uncomfortable. So I requested permission of the teacher to

move around the classroom. This I was able to do. So I was able to see Amy work at close hand and all of the other children as well.

Finally, it was almost time for their lunch and so they were getting themselves ready for lunch, and Miss McLaughlin came to the table where I was then sitting and I just complimented her on what a nice class she had.

Suddenly, Amy came from the group where she was across the room and she sat on Miss McLaughlin's lap.

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She picked up the microphone and she was playing with the microphone and Miss McLaughlin. Miss McLaughlin said, "Don't do that," and she stopped.

She had on a little T-shirt

and I asked her what it said on her T-shirt, and she said, "Pomotah, P-o-m-o-t-a-h Beach, Maine." But she replied properly.

In the middle of this T-shirt was this beautiful red lobster. I said, "What's that?" She said, "It's a lobster." Then she described how she had eaten two lobsters.

She also began to play with Miss McLaughlin's hair, and in no time flat I was commenting, first, on names and the similarity between Miss McLaughlin's name and mine, which she had asked me to tell her. Then she came over and she began to play with my hair. She patted it and she talked about liking grey hair. So apparently -- whatever intrigued her, I don't know.

Q Did that exchange have some significance to you?

A I thought it revealed, first of all, that she and her teacher have excellent rapport and that she respects her teacher and her teacher has great respect for her and cares about her learning academic work, but also about her social behavior and about her feelings. From that point of

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view I thought this situation was superb.

I have evaluated and gone in to see a great many children in different classroom settings in several states, and I can't say that at seven years of age I have seen any child being so comfortably and gracefully accepted and given the

attention she needed and wanted at a given point in time.

I felt that the language she was giving off, producing, was spontaneous language. The structure was excellent. I saw no difficulty. The speech was good, really very intelligible.

Q Did you have a further observation of Amy?

A Well --

Q Did you observe Amy in the lunch room?

A Yes. I did go to the lunch room but I went after the children were seated so that I would not be intruding in another situation.

Q What did you observe there?

A I observed Amy having a conversation with two children, one across the table from her, one to the

right and the children communicating with her. There seemed to be no difficulty at all in the relationship, which was extremely exciting to me. There was no isolation.

Q Miss Mulholland, in your opinion and based upon

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your observation of Amy in the classroom, is she being provided an appropriate and adequate education?

A In my opinion I have not yet seen any school system provide what has been provided in this situation. I was very pleased about that.

In the particular educational situation in which she is, I think she is doing very well. I see the emotional state being cared for, her personality, her acadamic needs. All of this have been attended to by a

caring teacher. She might not be the most dynamic teacher in the world, but she is a person who relates beautifully to children and has a formal, organized class. So it is a teacher-directed class, and that's her basic strategy.

Q Let me show you what has been marked as Exhibit No. 4 on behalf of the school district, and ask you to take a look at that.

(Pause.)

A Yes.

Q Could you tell us what that is?

A This is the Metropolitan Achievement, Primary 1, Form G, and bears the name of Amy, with her scores.

Q What does the Metropolitan test measure?

A It varies according to the levels. But at this point it is checking on reading and arithmetic concepts

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and computation.

There are three parts to the reading: word knowledge, word analysis, and sentence reading, story reading, and then the mathematical concepts and the simple computations. The proper computations for that level, of course.

Q Is this a nation-wide standard test?

A Yes, it is.

Q Would you take a look at the back of the test which shows the scores?

A Yes.

Q In your opinion did Amy do

well on this test?

A Yes, I would say she had done well. Grady equivalent rank from 2.1 to 2.5, which placed her anywhere from the 78th on reading, 84th percentile on word analysis, and 86th percentile on word knowledge, which I would think is good.

Q I would like to show you what has been marked as School District Exhibit 3 in evidence. Could you tell us what that is?

A This is the Stanford Achievement Test, Primary Level 1, Form A. This is, too, is a basic test on reading, word study skills, what they call math concepts, and computations.

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Q Is this a standard national test?

A Yes. By the way, the Stanford tests have excellent validity and reliability. This is a very solid test.

And in the literature in the field of deafness we have used the Stanford widely, and there is a considerable liturature on older forms and emerging on some other forms.

Q Would you take a look through the subtests as they are scored in the booklet itself and tell us whether Amy performed well on that test?

A The first one on vocabulary, she tested 32 out of 37 correct, which put her at a grade 3.3 level. On reading of words here she scored 34 out of 45 correct, which gave her a 1.9 grade level. A second test of reading using sentences, she scored 41

correct out of 42, and earned a 3.5 grade level, a score of 3.5 grade level. On the word study skills, that apparently was not administered, and on the mathematical concepts, which would be number facts, she was -- excuse me, that is identifying such things as numbers, like 3, 4, 5, what's the next number, but there are no directions with it because you just know what to do. On that kind of test she scored grade 4.0.

On the mathematical computations she scored

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31 out of 32. which gave her a grade level of 4.5.

Now, on the listening comprehension, I'm not sure how the teacher gave that test, on that score she did score 5.7, and she had 25 out

of 26 correct.

Q Miss Mulholland, based upon your observations and your investigations into the education being provided for Amy Rowley, in your opinion is a sign-language interpreter required in Amy's second-grade classroom?

A In my considered judgment, there is no need at this time for a manual interpreter. I do not preclude that being a valuable asset in the future, but at this time I do not see that she needs an interpreter.

May I give the reason for that?

Q Please do.

A One of the reasons is that I am looking at Amy as an individual child in a particular educational setting. And in that setting which I have described as formal and

teacher-directed, I'm not sure what an interpreter would do. Because Amy is free to turn around and talk and she is communicating and there is no intermediary through whom she must go. She relates directly to the children, she relates directly to the classroom teacher and to all of those with whom I saw her in contact.

It may be as the work becomes more complex it

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would be valuable for her to have a manual interpreter.

Q Do you mean at second grade or future grades?

A I would say in future grades.

I would think at this point she is developing some social skills with her peer group and she is

comprehending and expressing herself in language that is excellent, and I think she is doing just beautiful.

Q Might a sign-language interpreter in a classroom prove harmful?

A It could.

Q Would you tell us how it could?

A I don't know that anyone has ever studied this. All right. Maybe I will illustrate.

When Amy came over to where Miss McLaughlin and I were sitting and talked in a very gentle way with Miss McLaughlin and was curious about me and my name and we were communicating, she climbed up on Miss McLaughlin's lap. If she had an interpreter I'm not sure what would have happened. Perhaps Amy would have said, "May I

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sit on your lap? Or what's her name?" I could not see that an interpreter would have a particular role in that situation because it is a formalized teacher situation.

Q Would the presence of an interpreter inhibit Amy's development in some fashion in that classroom?

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A Well, in the instance I have just been describing, a second individual or third individual not part of the communication system might be considered intrusive. "Might be" I said.

I think what I am trying to point out is there isn't much incidental that is going on that the child is not already involved in.

* * *

Q Miss Mulholland, in your experience what is necessary or what skills, rather, should Amy have now or be acquiring now to assist her in future progress or development?

A At this age probably one of the most important skills that she is learning is how to read and to develop the many skills that one -- subskills which one must have in reading.

Q Why must she acquire those kinds of skills?

A Certainly reading widens the horizons of all of us, and for deaf children, deaf persons, the ability to read well is extremely important. Psycholinguistically an individual develops through reading considerable comprehension, understanding of the language structure, learns about subordination of ideas. I could go on

with many of

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those skills.

Since she already has a good start in language, since she already is learning sentence structure, or rather, the structure of the language itself using a variety of forms, probably the chief learning is that of reading, being highly competent in reading.

She is well on the way to that according to the reading tests which she has had.

Q In her particular case would the acquisition of those skills be enhanced in any way at the present time by the presence of a sign-language interpreter in the classroom?

A In my opinion that is not

necessary now.

Q Why is that?

A I think basically there is little congruence or consonance between signs, or sign language, rather, and written English, and I think that since she is already showing good progress in reading that such an additional support system may not be necessary at this time, is not necessary at this time.

Q Would you describe for us the prevalent or predominant theories of education of the deaf and describe for us the schools of thought by their common names or in some fashion that would assist us in identifying the

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major philosophical attitudes toward education of the deaf.

A First of all, I would like to say that my coming here as a

witness is in support of Amy as a deaf child. I am not here to argue the merits of one system or any system over the other. My only function here is for that purpose.

However, if it would help to understand, I will quickly -- for those who are not experts in the area of deafness, then I will be pleased to express it.

Q Please do.

A Essentially there are, in strictly layman's terms, there are two kinds of systems, two approaches using different communication modes. One stresses manual communication. That generally is using signs. Since we have acquired such a considerable amount of information on linguistics, linguistic knowledge has been applied to some systems, so we have sign

English and other kinds of systems. These are manual, but they more closely follow standard English.

Another approach to learning is through, historically what is called an oral approach. Now, that term predates the use of electronic amplification systems and is basically a system of instruction or an approach to instruction using speech reading and speech.

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What is available today for deaf youngsters and was not available 25 or even 30 years ago is the auditory-oral approach, which emphasizes the employment of residual hearing, both personal hearing aids and group units in the classroom, which provide for most deaf children a means of developing a language system

which is using auditory cues. So that their oral-expressive language is enhanced through the use of improved stress patterns, improved intonation, etcetera.

Receptively, there appears to be some relationship between comprehension and the use of auditory cues, such as pausing, etcetera.

Q Would you explain that, please? Just briefly. I am not asking for a technical explanation but one that would assist us in this trial.

A Let me give you an illustration. Children can learn to disambiguate sentences like: She fed her pet goldfish, or she fed her pet goldfish, through auditory cues.

Now, it is clear that we are talking about early use of

amplification in infancy, early use by the parents of hearing aids, helping the children to develop their auditory receptive repertoire.

This kind of approach has, with a tremendous number of deaf children, been most successful, and I would

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suspect that a number of the person who are young deaf people coming along in a variety of fields, have had that kind of exposure.

Now, auditory-oral education then is using as much of the cues or as many of the cues auditorally to enhance speech reading, because profoundly deaf children are primarily visually functioning and they will be speech reading. So we are not trying to make deaf people hear. We are

trying to enhance their reception of language through the use of residual hearing. But the primary mode is a combination of speech reading and listening.

I could give a lecture but I don't want to do that.

Q Is it this approach that, generally speaking, is being used with Amy at the present time?

A I would say that's true in the school situation, yes. Based on my observation, that's what it was and she was making good use of her residual hearing.

Q When you say she was making good use of her residual hearing, what do you mean by that?

A She has good intonation patterns, she has quite good articulation, but she has -- she is

hearing a great deal, of course, in the low frequency, so she is capable of hearing all the vowel sounds without any amplification

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Consonants, she is missing out on some of the high-frequency consonants, but through training there is information which will facilitate her acquisition of language when she has -- maybe I had better start all over again.

Through these auditory cues she is improving both her receptive language and also her expressive language.

Q Now, in the course of your preparation for this testimony did you have a chance to review the audiological reports and audiometric tests that were performed on Amy?

A Yes. She does show --

Q I was going to ask you what do those tests show, again in general terms?

A I don't have it in front of me --

Q I can show them to you if you would just wait for a second.

A All right.

THE WITNESS: The one I have is 1976.

Q I am going to show you what has been marked as Exhibit 1 for identification. Take a look at that (handing).

I would also like to show you what has been

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marked as Exhibit 21 (handing).

A Is it possible for me to go back one step?

Q Certainly. Please do so.

A As you could tell, I was losing my train of thought. I indicated to you there were two primary modes of communication -- approaches. I said manual, I said auditory-oral, and I said pure oral, which is without electronic amplification. I did not proceed further, and I should have, that there is -- there are two other methods. One is the simultaneous method, which is used at Gallaudet College, which is widely used. There is also the Rochester approach, which includes finger spelling and speech. Then there is a philosophy of total communication which includes all possible communication modes, which would include the use of amplification, speech reading, speech

and also manual communication, which can be both finger spelling and signs.

Q I will direct your attention now to Exhibit 1 and Exhibit 21. Could you tell us what those exhibits are?

A Exhibit 1 is dated February 20, 1978, and is a summary of a hearing aid check. The second one is dated April 24, 1978, and is a summary of a hearing aid evaluation.

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Q Are those audiological reports showing residual hearing?

A Yes.

Q What do they show?

A They show that Amy has considerable residual hearing in the low frequencies. She was tested at 250, and since that is so high it varies between 20 and 30 dB. One

would postulate that 125 was even higher.

At 500 frequency she has about a 75 dB loss in one ear, greater in the other.

On this one she has an aided threshold of 45 dB.

Q When you say "this one," what is that?

A This is the Gallaudet College clinic on February 25th. She has an aided speech awareness threshold, which means she is aware speech is going, at 45. Using amplification she has a speech reception threshold, which means she can make some discriminations, between 55 and 60 dB, which would be in the moderate range on the aided threshold.

Using vision and audition, she scores speech discrimination at

about 55 -- excuse me, 76 percent, I'm sorry. At 76 percent using vision and audition. Her aided threshold, using just audition alone, appears to me 16 percent. So she is getting a considerable amount of information

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combining audition and vision.

Q In terms of Amy's classroom, in an unaided state, what does the audiological report show?

If I can put that another way to you, what sound information is Amy capable of receiving in her classroom in the unaided mode?

A Well, she certainly is hearing vowels; that is, she is hearing first and second foiment. And as we know transitional foiments also carry a great deal of information. She is able to perceive not at far

distance, but at close distance, she is able to perceive vowel sounds unaided. As a matter of fact, that is common in using it as a hearing check with little children.

Q You used a word I am unfamiliar with. That foments?

A F-o-i-m-e-n-t. First foiment and second foiment. That's a way of acoustically analyzing speech sounds, examining their frequency or pitch and their intensity or loudness. All of the phonemes, the vowels and consonants of the English language, or other languages, too, can be plotted against an audiogram and we can -- we know what youngsters are capable of hearing by employing our knowledge of foiments and what a child is capable of receiving.

For example, we use one technique, which is plotting an audiogram against a phonogram. I do this with a great deal of students. It shows where a child's or an individual's reception of a sound falls in terms of frequency and intensity.

So you can plot if a child can hear an O or an A.

Q Do these tests show that Amy can receive assistance from electronic hearing supplements?

A Yes.

Q And how do the tests, specifically the tests you have in front of you as exhibits, demonstrate that?

A Well, it shows the difference between her aided scores and her unaided scores. It shows what

she is capable of perceiving and of recognizing.

She had a speech awareness threshold, which means she could just tell that speech was ongoing, that is the 45 dB; she had a speech reception threshold at between 55 and 60 dB when they use responding words.

Now, the test situations generally use words, not necessarily running speech, certainly at young levels, young ages.

And she was tested also at one time on the auditory training unit she had, and she earned a discrimination

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score of using audition alone of 36 percent. So that that means she has learned to process a good bit of information, speech sounds, using

hearing along. You see, in the very low frequencies she has close to normal hearing.

Q When Amy is hearing speech or seeing speech on the lips in a context such as a classroom with which she is familiar, is her perception likely to be greater than in a test situation?

A Oh, yes.

Q Why is that?

A Well, for one thing she would be both speech reading and listening at the same time in the classroom; whereas she would be, in a test situation, be tested on listening alone, just listening.

Sometimes children are tested using taped words so they don't see even the human face when they are being tested. I don't know exactly

that that was done here. I didn't recall it said that.

Q When students are tested using a tape, how does that impact the results as against a test which would be conducted in context?

A It is an objective measure, if you will. But with children it is not that -- it is useful in helping you to determine how much value the child is -- or how much

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improvement the child has made in developing listening skills or in responding to audition alone. It is more difficult to listen to a tape. It would be testing, then, audition, not the combination of speech reading and listening, which is what we advocate with children.

* * *

Mulholland - Direct [374]

Q Miss Mulholland, on the basis of your review of the documents and records in this case and on the basis of your observation of Amy in the classroom, is the district's program of providing Amy with a mainstream classroom setting, with supplementary services, which include the use of the FM wireless auditory system, the services of a speech therapist three times a week, and the services of a certified teacher of a deaf one hour a day, an adequate and appropriate program for the education of Amy Rowley?

A In my judgment, yes, at this time.

MR. KUNTZ: I have no further questions.

* * * [380]

Q You testified that Amy

Rowley's speech is good, that her language is spontaneous, and that she has proper intonation or inflection.

Do you know if Amy Rowley was raised using total communication?

A I understand that that is so. I would compliment her parents on having given her a tremendous personal support, whatever that might have been, because she is a special child. She is not at all passive. She relates well to people. And sufficiently aggressive to be good to see.

DONALD F. MOORES-TESTIMONY [402]

Q What is your name and occupation?

A Donald F. Moores. I am head of the Division of Special Education and Communication Facilities at the Pennsylvania State University. I am a professor of education of exceptional children and a professor of speech pathology and audiology.

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Q Please tell us something about your educational background and experience in the education of deaf children and in the psychological aspects of deafness.

A My educational background, I have a Bachelor's degree in psychology from Amherst College in Amherst, Massachusetts; a Master of Science Degree in education of the deaf from

Gallaudet College in 1959; I have an MA degree in special administration in the area of deafness from California State University of North Ridge, as part of the leadership training program in the area of the deaf; I received my Ph.D in education at the University of Illinois in 1967, with an emphasis on deafness, learning theory and psycholinguistics.

My teaching background --

Q Have you written any books or articles on the subject of deafness?

A I published a book last year entitled "Educating the Deaf, Psychology, Principles and Practices," which was published by Houghton, Mifflin.

I have finished this week a long-term study on preschool programs

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for deaf children which will be published by the American Speech & Hearing Association, monographs.

I have published 20 research monographs on

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the area of deafness and I would think approximately 60 or 70 publications related to various aspects of deafness.

* * * [407]

Q How would you characterize, categorize total

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communication?

A There are two definitions or two distinct approaches to the term "total communication." I believe Dr. Mulholland referred to both of them.

One is the idea of total communication as incorporating all

aspects of communication, depending upon a situation. So within that context we would have total communication in this room. With visual displays, visual electronic displays for some individuals, with oral communication only for other individuals, with manual sign-language interpreters for others, and with oral-manual communications simultaneous for even others.

That is the philosophical statement that people talk about when they refer to a total communication system which would incorporate different approaches to different children or different individuals at different times.

Now, I believe the Alexander Graham Bell Association has a definition that would equate the

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simultaneous use of oral and manual communication with the simultaneous method. Some people talk about that as total communication. Some people refer to it as the simultaneous method.

If you consider total communication to incorporate the use of all methods at different times when appropriate, this is, of course, by definition is the most

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appropriate and most flexible way of dealing with deaf individuals.

* * *

With younger children, I worked with the District 287, which is an intermediate unit, a large unit in the Minneapolis, Minnesota area, to develop programs for what I will call

hearing-impaired students, which would include those who would traditionally be considered deaf

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and those considered hard of hearing, those with moderate hearing losses. The program was set up in such a way that we could provide services or they could provide services to children with a range of options from self-contained classrooms to resource rooms where the child might spend a half a day in a regular classroom, half a day with the teacher for the deaf, to the services for children on an itinerant basis, something like what Amy Rowley is receiving now.

We found with the provision of interpreters, that many children who would be considered deaf and who, by themselves, were not able to profit

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from the regular classroom, could spend large amounts of time in a regular classroom to good benefit, but that these children without provision of interpreter services, regardless of their intellectual ability, many of them were not able to function effectively.

Some of the other things that we did with another program which was a St. Paul, Minnesota program, was the integration of deaf and hearing children with a teacher of the deaf and a teacher of the hearing in the same classroom. In other words, the integration of two classes, in which all of the children were taught to use manual communication as well as oral communication. That

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program seemed to work quite

effectively, until the final crunch increased the numbers of deaf children and hearing children in a classroom, and then it became unmanageable.

We have conducted some research on children who have been "mainstreamed" before the age of eight, without the provision of services. We have found that those children who have been effectively put into integrated settings have been those, who by age two, were those who were identified as having better hearing and better speech.

From my experience what you find is that without some intensive support services, the children, with very few exceptions, the children who succeed are those who have large amounts of residual hearing. With the addition of some moderate support

services, for example, interpreters, you increase the numbers of children who can succeed and you also increase the variety of children or the types of hearing losses that can be accommodated in the regular classroom.

* * * [426]

THE COURT: I have one further question.

You were here when Dr. Mulholland testified, and while she may not have said it directly, certainly inferentially she suggested that Amy is an unusually well-adjusted child. And I gathered that the impression that was made on her by actually observing Amy in this setting of the class at the Furnace Woods School, was that the social adjustment that she has been able to make to live

in a society of hearing children with a fairly free -- perhaps the "fairly" shouldn't be there -- with a free communication with those children is a value which has to be weighed against perhaps the other value of a more complete communication.

Do you have any opinion on that?

THE WITNESS: I don't have any evidence to suggest that the provision of interpreter services would detract from her communication skills or her socialization skills. When I say "her," I should put this in a more general way, from a deaf child's socialization skills.

I think most deaf people as they grow, far

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better than hearing people, understand

that they live and deal with hearing people and deaf people in a variety of settings, and most develop effective ways of doing so.

THE COURT: But for a child of six or seven or eight, isn't it very important that if it can be achieved, that she function in an atmosphere which, so far as the children she is functioning with, is as normal as possible?

THE WITNESS: Certainly.

THE COURT: And doesn't the introduction of a sign interpreter make that more difficult?

THE WITNESS: I don't think it would be any more difficult than the introduction of the auditory training units which the children pass around. The question is what is needed to make it effective. Each

time you introduce something there is an element of danger, whether it be an auditory training unit, or whatever, or an instrument such as that.

The question is can it be done without disrupting the give and flow, the give and take, the everyday flow of communication. I think a sensitive interpreter can do so.

PLAINTIFFS' EXHIBIT 2
SUMMARY OF COH MEETING
12/13/78

Case #13 (78/79)

A girl in the first grade at Furnace Woods School who is handicapped due to deafness.

This case was originally brought to the Board on October 13, 1978. The recommendation at that time was for student to remain at Furnace Woods in grade 1 and be provided with the services of a certified teacher of the deaf one hour a day, five days a week and also receive the services of a speech therapist three sessions weekly.

We met again on this case on Monday, December 11th, to consider additional information provided by the parents. The additional information was an affidavit from Dr. Robert Davila, President of the Council on the Education of the Deaf, relating to the question of the use of

interpreters in the school for deaf students.

The DCOH felt that this additional information was again just a one-sided opinion for an interpreter in the classroom for this child and in no way did it change the opinion of this Committee at this time. Therefore, the recommendation for the education of this child at this time is that the student remain in grade 1 at Furnace Woods School and be provided with the services of a certified teacher of the deaf one hour a day, five days a week and also receive the services of a speech therapist three sessions weekly.

In addition, child should receive a formal yearly written evaluation to determine

1. child's progress
2. appropriateness of services.

Plaintiff 9

RESUME

PREPARATION AREA: Deaf

NAME AND ADDRESS: Rowley, Nancy C.
1496 Washington St.
Peekskill, New York 10566

DEGREE STATUS:

Level	Institution	Year Degree Granted	Major Area of Study
B.A.	Gallaudet College	1962	Economics
M.S.Ed.	Gallaudet College	1963	Spec. Educ.
Post-Grad.	Hunter College		Social Stud.
	New York University		Spec. Educ.

PROFESSIONAL EXPERIENCES:

Type of Position	Agency	Date
Teacher: High School Dept. English, Social Studies and Math., Guidance and Health. Faculty advisor for student governing council	Pennsylvania School for the Deaf Scranton, Pennsylvania	Sept. 1963-June 1965
Teacher: Physical Education Dept. and coaching for girls' sports	New York School for the Deaf White Plains, New York	Sept. 1965-June 1966
Teacher: Elementary Dept. English, Social Studies, Math, Reading, and Health	New York School for the Deaf White Plains, New York	Sept. 1966-June 1969

CERTIFICATION

Council on Education of the Deaf
Class A. Permanent

New York State Education Department
Social Studies, Permanent

Commonwealth of Pennsylvania, Depart-
of Public Instruction
Social Studies, Provisional
Teacher of the Deaf, Provisional

CM-521

MEMBERSHIP AND AFFILIATIONS

Professional:

Conference of Executives of American Schools for the Deaf
Convention of American Instructors of the Deaf
New York State Association of Educators of the Deaf
Gallaudet College Center for Continuing Education and Community Education

Social and Civic

National Association of the Deaf
Empire State Association of the Deaf
New York City Civic Association of the Deaf
Teletypewriters for the Deaf, Inc.
Delta Epsilon Sorority
American Athletic Association of the Deaf
Amateur Athletic Union
International Games for the Deaf
National Association of Skindiving Schools
International Association for Parents of the Deaf
World Federation of the Deaf
Gallaudet College Alumni Association
American Red Cross

CURRENT PROFESSIONAL ACTIVITIES

Founder, President of the Board of Directors, Past Chairperson of the Advisory Council, Westchester Community Services for the Hearing Impaired, Inc.
Member, Advisory Board, Westchester County Coordinating Council for the Disabled, Westchester County Government
Member, Task Force on Legislation and past member of Task Force on Architectural/Communication Barriers, Westchester County Government
Consultant, Westchester County Office for Disabled
Member, Advisory Committee, Council for the Arts in Westchester

PAST PROFESSIONAL ACTIVITIES

Participant, 43rd Biennial Convention of American Instructors of the Deaf, West Hartford, Connecticut, June 1967
Vice-President,, President, New York School for the Deaf Teachers Association, 1968-69

Past Professional Activities (Con't.)

Participant, 44th Biennial Convention of American Instructors of the Deaf, Berkeley, California, June, 1969
Vice-President, Metropolitan Chapter, Gallaudet College Alumni Association, 1974-75
President, Metropolitan Chapter, Gallaudet College Alumni Association, 1975-76
Participant, VII th World Congress of the World Federation of the Deaf, 1975
Representative, The Northeast States Community Education Conference, New York City, February, 1975
Participant, IAPD Conference, Washington, D.C. 1975
Chairperson, Westchester Action Conference, White Plains, N.Y., November, 1976
Member, Board of Directors and Chairperson of Funds and Foundation Committee, New York Center for Law and the Deaf, 1977-78
Organize Committee, American Professional Society of the Deaf Conference on Law and the Deaf, New York City, April, 1977
Representative, New York State Alliance for Action Conference in the Field of Education of Children with Handicapping Conditions, 1977
Representative, P.L. 94-142 Workshop, Gallaudet College, Washington, D.C., August, 1977
Representative, National Community Education Action Conference, Virginia, 1977
Participant, 2nd TDI Convention, Rye, N.Y., June, 1977
Participant, Biennial Convention of the ESAD, Albany, N.Y., August, 1979

PUBLICATION

Author, "Education Is A Sleeping Giant", The Panwood Journal, Summer, 1975

AWARDS

CYO Athletic of the Year 1961, Rochester, New York
World Olympic Games for the Deaf, Winner of three medals (gold, silver, & bronze) for swimming, Helsinki, Finland, 1961

Nancy C. Rowley
August, 1979

PLAINTIFFS' EXHIBIT 11 -
WESTCHESTER COUNTY MEDICAL CENTER REPORT 6/78

WESTCHESTER COUNTY MEDICAL CENTER
SPEECH AND HEARING CENTER

Edwin T. Cleveland, M.D.
Associate Attending & Chief
Otolaryncology Section
Division of Surgery

Barbara Kligerman
Audiologist

ROWLEY, AMY
Hospital #881038
Parents: Clifford and Nancy Rowley
1496 Washington Street
Peekskill, New York
D.O.B. 1/7/72
Dates of Examination:

5/25/78, 6/1/78, 6/22/78

HEARING AID CONSULTATION

Amy Rowley, age 6 years, was seen at this Center for audiological re-evaluation and hearing aid consultation. Amy is seen at this Center for speech and language therapy on a twice weekly basis. She has been using two ear level instruments, a Norelco 6732 worn on her left ear since October 1974 and a Norelco 8276 worn on her right ear since December 1975.

TEST RESULTS:

Pure tone testing revealed a severe precipitously sloping bilateral hearing loss which agreed with the thresholds obtained previously both at this Center and at Gallaudet College. Speech awareness thresholds were obtained at the level of a mild hearing impairment which reflects the better hearing at the lowest frequencies. Speech thresholds obtained at significantly higher levels, more accurately reflect the severity of the impairment in each ear. Speech discrimination testing by means of picture identification, is very poor; with visual clues Amy's ability to discriminate among a six word closed set improves dramatically.

Hearing aid evaluation consisted of aided responses to warble tones in sound field and speech discrimination as assessed by the Word Intelligibility Picture Identification Test. These measures were obtained using her own Norelco hearing aids, the Siemens 24 PP A and the Unitron 960 P instruments. Although each of these hearing aids resulted in improved response over unaided scores, significantly better responses were obtained with the Unitron 960 P. Particularly encouraging was the improvement in word discrimination, while both the Unitron and Siemens instruments resulted in improved discrimination, warble tone re-testing demonstrated more consistent results when using the Unitron 960 P hearing aid for each ear, and these findings agreed with those obtained recently at Gallaudet College.

IMPRESSIONS AND RECOMMENDATIONS:

On the basis of the test findings, Amy continues to present a severe bilateral hearing loss which necessitates usage of binaural hearing aids and special educational services including intensive speech and language therapy. It is believed that her good communicative skills are due to a combination of favorable factors: the early and continued use of sign language (both parents are deaf and use oral and manual communication), hearing, speech and language therapy from the age of 2 years, excellent speech reading ability, Amy's intelligence, and continued usage of appropriate and adequate amplification.

This evaluation demonstrated that Amy's hearing aids, one of which is over four years and the other over two years of age, are no longer providing her with with most appropriate nor adequate amplification. In addition, the electro-acoustic analysis of these instruments, conducted at Gallaudet College, raised serious questions regarding their functioning.

Therefore, it is recommended that Amy receive two new Unitron 960b ear level instruments (State price $235 each) to be worn binaurally. New earmolds have recently been made, one of which requires either adjustment or re-making for a better fit and these should be supplied in a soft material (State price $16 each of $32).

Amy should return to this Center for a hearing aid check. Electro-acoustic analysis of each aid is requested to be supplied by the dealer, Sylvester Hearing Aids, 241 Main Street, White Plains, New York. Amy should continue to receive intensive individual speech and language therapy twice weekly at this Center an annual audicogical evaluation.

Barbara Kligerman, Ed.D.
Audiologist

BK:mg

cc: Sylvester Hearing Aid Center
241 Main Street
White Plains, New York

PLAINTIFF'S EXHIBIT 23 -
MEMORANDUM TO ADELAIDE WALDRON FROM BARRY BINDER

To: Adelaide Waldron
From: Barry Binder
Date: 9/15/78
Re: State Requirements for children who are deaf.

At a meeting at BOCES I was informed that all the State requires for a deaf child is that we provide one hour a day of individualized instruction from a teacher of te deaf. A Miss Amy Toole (BOCES Supervisor) informed me that she could provide us with a teacher of the deaf for one hour a day, 5 days a week. The teacher of the deaf would teach speech and language development. The acquisition of such a service would put us in total compliance with State regulations. Any service beyond this is not mandatory.

The bill for the teletype machine, ordered by our district for communication with the Rowly, must be submitted to Dr. Don Coe at BOCES before September 30, 1978. As this order was funded through Title VI-B last year, the deadline for reimbursement is this September 30th.

cc: Mr. Eible
Dr. Zavarella

DEFENDANT SCHOOL DISTRICT'S EXHIBIT 2-COH MEETING MINUTES

Furnace Woods Elementary School
Pupil Personnel Services
I.E.P. Conference for Amy Rowley
December 6, 1978 Wednesday
1:30 p.m. Room 11 Furnace Woods

Present: Mr. and Mrs. Rowley with Interpreter Robin Read
Mrs. Globerman - (Amy's Teacher)
Mrs. Garzione - (Speech Therapist)
Mrs. Williams - (BOCES Teacher of the Deaf)
Ms. Klausner - (Psychologist)
Mrs. Roberts - (Nurse/teacher)
J. Zavarella - (Principal)

The meeting began late at 2:50 p.m. - After the initial amenities were exchanged and seating arrangements established for the Rowleys to have best visual access to the interpreter as well as eye contact with all present we discussed the purpose of the meeting.

Purpose - To develop with the parents the Individual Educational Plan for Amy.

Mrs. Rowley asked if everybody knows what an IEP is and it was stated that we all knew.

Then they asked permission to distribute a copy of an affidavit prepared by:

Dr. Robert Davila, V.P. for Model Secondary School
for the Deaf
Kendall Demonstration Elementary School for the Deaf
Gallaudet College
Washington, D.C. 20002

In brief this paper establishes one person's conclusion that an interpreter is necessary in school.

The point was made that although interesting to us it can have little or no bearing on the development of an IEP.

For details of IEP please refer to the attached.

Mrs. Globerman then went through her prepared notes defining all the parts of the IEP. She also included inputs of specialists in music, art, phys. ed and library.

Mrs. Garzione then described her goals and objectives for Amy. This was quickly followed by Sue Williams' goals and objectives for Amy.

Mrs. Rowley suggested that the IEPs should be copies so that they could be reading it and therefore have better understanding.

After discussion on the data about Amy's progress we cleared the issue of achievement tests and that Amy would take the test in May as part of our annual evaluation.

Ear molds must be replaced for the Earmark aids used in room.

Mr. Rowley asked that we commit ourselves to help Amy if she needs help. We have certainly had Amy's best interest at heart and if she begins to falter at any point we shall make all necessary arrangements to seek a solution to her problem.

The Rowleys did not agree with the IEP on the basis that a recommendation for a sign language interpreter was not included, therefore we must submit the case to the District Committee on the Handicapped for its review.

Please note that Furnace Woods P.P.S. did not agree with the Rowleys that the need for a sign language interpreter has been demonstrated. We continue to observe a well adjusted, bright, and achieving first grader. There is no reason at this time for us to consider the sign language interpreter as a necessity for Amy. However, if and when such a need arises we've assured the Rowleys that this staff would certainly consider recommending the interpreter as an option among many to resolve the problem. The IEP will be re-typed and attached to these minutes with a request to Mrs. Waldron that the D.C.O.H. review the case.

Respectfully submitted,

J. Zavarella, Principal

DEFENDANT SCHOOL DISTRICT'S EXHIBIT 6 - AMY ROWLEY'S SCHOOL RECORDS

Hendrick Hudson School District
Montrose, N. Y.

Elementary Record

F.W.
School

Last Name Rowley First Amy Middle June

Parent or Guardian Clifford - NANCY
Address 1496 Washington St. 737-5117 Peek.
Phone

Occupation Research Chemist
Employer Lonza Inc.
Address 22-10 Route 208 Fairlawn N.J.

Dates
Birth: 1/7/72
Mo. Da. Yr.
Certificate: X List other
Entrance: 9/77
Left:

Year	K		1		2		3		4		5		6		Repeat		Repeat	
Terms	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2
Teacher	Tower		Globerman															
Grade	K	K	1	1														
Date	77	78	78	79														
Days Absent	2	2	12	2														
Reading			E	E														
Writing			G	G														
Spelling																		
English			E	E														
Arithmetic			E	E														
Soc. Studies																		
Science																		
Art			E	E														
Music			S	G														
P. E.			G	G														

OAG-529

Standardized Tests

Name of Test	Form	Date	Gr.	Sub.	Gr. Ach.
Brebin Inventt.	B	2/28	K		.21
Met. Ach. Test	G	5/79	1	Read	2.2
				Math	2.1

Mental Tests

Name of Test	Form	Date	Gr.	C.A.	M.A.	I.Q.

Remarks

1st. Speech, Teacher for the Deaf.

TRANSCRIPT OF ORAL ARGUMENT BEFORE THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
- - - - - - - - - - - - - - - - - -x

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Plaintiffs-Appellees,

-against-

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT OF WESTCHESTER COUNTY and the COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellants.

- - - - - - - - - - - - - - - - - -x

U.S. Customs Courthouse
New York, New York

May 1, 1980
11:20 o'clock A.M.

B E F O R E:

WALTER R. MANSFIELD, Justice, C.J.J.

WILLIAM H. TIMBERS, Justice

DUDLEY B. BONSAL, Justice, D.J.

* * *

MR. SHERMAN: [5]

Your Honors, New York, as well as all the other states, with the exception of New Mexico, received federal monies under Title 20, U.S. Code, Section 1401 et seq. and I also understand that New Mexico may be coming in the fall soon.

In order to receive these monies, New York must provide all handicapped children within its borders, a free appropriate education.

What does this mean? It means, as the statute indicates, that the children will be provided with a special education and related

[6]

services at no charge.

Special education is a kin to curricular or the type of instructon that

will be offered to the children.

These must be adapted to meet the unique needs of the children.

Now, related services are those services which assist the child in benefiting from this special instruction, or special program. It wouldn't make any sense to have a special instruction in place and then not provide any services to the child so the child cannot benefit from that program.

Each year, the states must demonstrate their compliance with the statute by submitting a plan to the United States Commissioner of Education indicating exactly how they will provide a free appropriate public education to its children.

Now, for the two years in question in this case, that is the school year

[6]

1978-79, and the current school year, 1979-80, Commissioner Ambach and his staff have prepared or prepared and submitted to the United States Commissioner of

[7]

Education, a state plan which indicates how the handicapped children of New York will receive a free appropriate public education. That is, what type of instruction will be applied and what type of related services are mandated.

JUDGE BONSAL: This is across the boards?

MR. SHERMAN: This is across the boards, sir.

JUDGE BONSAL: Yes.

MR. SHERMAN: Again, both years the U.S. Commissioner has approved New York State plans, notwithstanding the

[7]

fact that these plans do not require the local educational agencies or the local boards of education -- it does not require them to provide each deaf child the services of a certified sign language interpreter when academic subjects are being taught.

JUDGE MANSFIELD: Does the plan preclude the use of such an interpreter?

MR. SHERMAN: The local educational agencies could provide these services.

JUDGE MANSFIELD: What?

MR. SHERMAN: The local educational agencies or boards of education -- it is

[8]

the Commissioner's positions that the local boards could provide these services and, in fact, the educational department would reimburse the dis-

trict for providing it, however --

JUDGE MANSFIELD: What significance is there to the fact that the federal Commissioner approved the state's standards?

MR. SHERMAN: When I say "they could," your Honor, I understand these are not mandated.

JUDGE MANSFIELD: That may be. All I want to point out -- I thought your argument was that since the state plan was approved, it contained nothing in it with respect to sign language interpreters; therefore, there was no obligation to provide them.

MR. SHERMAN: There is no obligation under the statutes or under the state plan; however, the local educational agencies or boards of education

[8]

certainly could provide more services then are mandated by law.

I think that is the whole point here. In fact, if they did provide such services and in the case of Amy Rowley, or any child, we certainly would reimburse them for providing it.

[9]

JUDGE MANSFIELD: The federal statute does provide in addition to, in defining free appropriate public education, that it must not only meet the standards of the state educational agency, but also include an appropriate pre-school elementary or secondary school education in the state involved.

MR. SHERMAN: That is correct.

JUDGE MANSFIELD: Doesn't that flatly raise the question of what is the meaning of the word "appropriate"?

[9]

MR. SHERMAN: Well, in the case abar, we submit that the performance of the child certainly clearly indicates that she is receiving the instruction without these services that are not mandated by the statute.

Now, the district, I am sure, will take the position that they could provide the particular service here, but are they required to?

I think that is the question that has to be answered by this Court.

JUDGE BONSAL: Is it your position that these local boards, in effect, should have the autonomy -- they have the expertise, you think,

[10]

to determine these conditions rather than the Courts? Is that what you are saying?

[10]

MR. SHERMAN: Absolutely.

JUDGE BONSAL: Is that your point?

MR. SHERMAN: That is one of my main points. Under the statute itself, as a matter of fact, it provides for these due processes of reviews and, of course, includes a review by the federal courts.

JUDGE MANSFIELD: Is this a review -- I mean by the District Court -- or is it a new trial?

MR. SHERMAN: Well, the federal statute indicates that the Federal Court shall receive the records or what have you before the local Commissioner of Education -- I mean the State Commissioner of Education -- and then it also provides that additional evidence may be taken.

[10]

Now, that apparently is a -- it is a review and also it is a new hearing. This gives the Commissioner some problem. He doesn't know what his role is in this at this point.

He made a decision based on some evidence on what was before him and now we are in the Federal Court at this point and, as a matter

[11]

of fact, a school year the Commissioner had nothing to do with.

He had no way of reviewing this particular placement and he is really quite concerned as to what his role is here.

If he has got a trial de novo, well, quite frankly, what is he doing here?

JUDGE MANSFIELD: What is your position on the subject?

[11]

MR. SHERMAN: The statute is pretty clear. It does say that additional evidence may be taken.

JUDGE MANSFIELD: But what I am trying to find out is whether that additional evidence is taken as part of a review or to supplement a review, or whether it is a complete new trial.

Normally, where you review the decisions of the administrative bodies, there is a whole body of law applicable under the Administrative Procedure Act and one normally will say that if there was substantial evidence to support findings of the state bodies, or any governmental bodies that are being reviewed, that they will be upheld

[12]

absent some basic legal error.

[12]

Here you have a statute which does provide for steps in administrative review, but that apparently provides that any party agreed by the findings made pursuant to that administrative review can bring a suit in the Federal Court and the Court then has to hear additional evidence and base its decision on the preponderance of the evidence.

Now, does that mean that this court starts from scratch and you get, in effect, two bites of the cherry?

MR. SHERMAN: I don't believe it should work that way.

JUDGE MANSFIELD: No, but the question is what was intended?

Did you ever look at the legislative history to find out?

MR. SHERMAN: Yes, I did. There was some talk at the time of an enact-

[12]

ment whether the review by the Court would be the same as -- well, for example in New York State, like an Article 78.

One of the actions is the officials

[13]

arbitrate capriciously and not based upon substantial evidence.

This apparently -- the present language is apparently a compromise between the forces that profess the Article 78 type review versus a federal cause of action which would provide for complete trial de novo.

I don't know why the compromise.

JUDGE MANSFIELD: What you are saying is we are dealing with a new animal here.

MR. SHERMAN: Absolutely.

JUDGE MANSFIELD: All right.

[13]

MR. SHERMAN: In this particular case, Commissioner Ambach was reviewing a -- well, let me just go back. As far as the U.S. Commissioner is concerned, he has taken a look at the statute and has found that it does not require the services of a sign language interpreter.

In other words, New York is not required to mandate these particular services to satisfy his obligations under the statute.

Of course, we are submitting that the U.S. Commissioner's construction of this statute

[14]

should be given great weight. It should not be disturbed unless it is known to be patently wrong.

* * * [26]

JUDGE MANSFIELD: Did the Commissioner of Education, or the district state what standard there should be for determining the unique needs of handicapped children who were deaf in relation to the state's educational process?

MR. SHERMAN: Well, we certainly demonstrated what the district was providing in the case of Amy Rowley.

JUDGE MANSFIELD: Yes, but the question is what program -- what is meant by "Appropriate" and does that mean a program that will allow a child to become self-sufficient?

Does it mean a program that will allow a child to reach his or her maximum potential,

[27]

or does it mean a program that will

[27]

enable a child to become as independent as possible from dependency of others, or does it mean, as the District Judge thought, that the child must be given an education that will develop the child's potential to an extent comparable to the development of the potential of other children in the district?

MR. SHERMAN: Well --

JUDGE BONSAL: If I understand, an equal opportunity to obtain this education. Is that the standard?

MR. SHERMAN: We certainly feel that handicapped children should be given an equal opportunity to attain an education.

We have a lot of trouble with the lower court standard. He said how you apply this standard and to determine whether the child is getting an equal

[27]

opportunity is: You compare the child's -- this is the handicapped child's -- potential with that child's actual performance.

Now, obviously every -- and that is considered to be a short form.

JUDGE MANSFIELD: I am unclear from that

[28]

whether you agree that the standard was a correct one.

I got the impression from --

MR. SHERMAN: It is totally incorrect.

JUDGE MANSFIELD: I got the impression you did not agree with that.

MR. SHERMAN: It is not only incorrect, it is unworkable.

JUDGE MANSFIELD: What do you say the standard was and what standard was applied by the state bodies that

[28]

reviewed this case?

MR. SHERMAN: This shall be done on an individual basis. That is the whole point here.

JUDGE MANSFIELD: What?

MR. SHERMAN: To determine whether a child is receiving an appropriate education you have got to look to that child's performance in the classroom.

You cannot come out and say --

JUDGE MANSFIELD: I understand, but even if you determine every case is determined on an individual basis -- I hope -- the question is what standard do you apply in making that determination in each individual case?

[29]

MR. SHERMAN: Whether the child is receiving an education. Whether the child is receiving the skills to enable that child to function in his

[29]

world. Whether the child can learn to read, can learn to do mathematics, can learn to -- the goal of education is to educate the children.

Now, you certainly look to see if that particular child is receiving an education.

In the case of Amy Rowley, it is clear.

JUDGE MANSFIELD: Aren't you of necessity required to compare with others in making that determination?

MR. SHERMAN: Well, I don't believe we are. I don't believe so, your Honor. I don't believe that is the standard at all.

I think there have been numerous court cases that said that school districts or state education agencies, or what have you, don't have to maximize the potential of children.

[29]

Certainly we want to do that and we are attempting to do that, but we recognize there are so many factors involved that it cannot be

[30]

done unless you have unlimited resources.

JUDGE BONSAL: The potential of unhandicapped children is competely different, too; isn't it? I mean it seems to me what you are talking about here is giving the handicapped child no further -- I don't know whether potential comes into it -- but the handicapped child should have an equal opportunity with unhandicapped children to receive whatever it is the school can offer.

MR. SHERMAN: I think that is true. There is no requirement that nonhandicapped children be provided an

[30]

education that will maximize their potential.

JUDGE BONSAL: No. I think that is it. If they got the equal opportunity, then from there on, it is up to them.

MR. SHERMAN: Well, I think that if you take a look at this child's performances --

JUDGE BONSAL: I say I don't know why that matters. Suppose the child's performance is very good? Isn't the test really whether this child had an equal opportunity with the others to learn the things that were taught in the

[31]

classroom? If the question is this child didn't because there was no sign language interpreter -- isn't that really the question?

[31]

MR. SHERMAN: Your Honor, there was absolutely -- the record is devoid of any evidence indicating what opportunity has been given to the nonhandicapped children in this district.

It would seem that the burden would rest with the plaintiff to demonstrate that she, in fact, was being denied this opportunity.

If there is nothing in the record to make this comparison --

JUDGE BONSAL: The record indicates she's a handicapped child. All right.

MR. SHERMAN: Yes, it does.

JUDGE BONSAL: Sure.

* * * [32]

JUDGE TIMBERS: Maybe Mr. Sherman would yield some of his time to you.

MR. SHERMAN: I am Mr. Sherman.

JUDGE MANSFIELD: Oh, you are Mr. Sherman.

[32]

MR. SHERMAN: I am Mr. Sherman, representing Mr. Ambach.

I guess I don't have too much time to give him.

Thank you.

MR. KUNTZ: May it please the Court, I am the real Raymond Kuntz, the attorney for the Hendrick Hudson School District.

The issue before this Court is whether the school district can be compelled under the provisions of the Education of Handicapped Children Act of 1975 to provide a supplementary service to a handicapped child in the face of irrefutable evidence that this child is performing extraordinarily well under the current supplemental services of and special education provided to that child in the hope that the additional service might -- and I

[32]

stress that -- might in some fashion help that child to do better than the child is already doing.

[33]

The District Court below answered that question in the affirmative by applying, in our opinion, a standard not sustained by the lanugage or the intent of the applicant.

The District Court's standard was that each handicapped child be given an opportunity to achieve full potential commensurate with the opportunity given to other children. The District Court went on -- because I frankyl think that we have no great disagreement with that standard as a standard per se, but it is inevitably coupled with the discovery process of how the local school disctrict may determine that it is meeting that standard --

[33]

and the District Court went on to say and requires that the potential of the handicapped child be measured and compared to his or her performance and the resulting differential, or short fall between the actual performance and the purported potential compared to the short fall experienced by non-handicapped children.

The District Court reached its definition on the theory that the Act did not contain a definition of a free appropriate public

[34]

education.

But the Act does, and I think Judge Mansfield, you focused in before on that Subdivision of 20 U.S.C. 1401, Subdivision 18, which defines a free appropriate public education and essentially consists of four elements.

[34]

It says that free appropriate public education is special education and related services which, one, are provided at public expense, supervised publicly and without charge, meet the standards of the state educational agency -- here's your point -- includes an appropriate education in the elementary, secondary school program in the state and is in conformity with the individualized educational program.

Now, I don't believe that the language of the Act is a redundant tortology, so-to-speak, that in a free appropriate public education, there is, among other things, an appropriate public education.

I think the framers of the Act meant the local school district and

[34]

the state to look at all of the elements.

Special education is defined as specially

[35]

designed instruction at no cost of the parents to meet the unique needs of the handicapped child.

And related services are those which assist the handicapped child to benefit from the special education.

So we have a clear plan set out in the federal Act as to what is expected of the state when the state submits its plans to the Federal Commissioner and what is expected of the local school district when it submits its plans and its judgments to the state authorities for review.

It is interesting in this regard to look at the definition of audiology in

[35]

the regulations.

Audiology is there defined in some six or seven paragraphs in terms of related services and in none of those paragraphs, which are quite extensive, is the service of a sign language interpreter mandated as a related service under the Act.

JUDGE MANSFIELD: I ask you the same question I asked Mr. Sherman. Do you say that

[36]

precludes the --

MR. KUNTZ: No.

JUDGE MANSFIELD: (Continuing) -- the use of a sign language interpreter in the appropriate case?

MR. KUNTZ: I say it does not mandate it. I say it is very clearly the Act's intent that certain remedical services be provided to handicapped

[36]

children who are deaf.

JUDGE MANSFIELD: Doesn't the question of whether it is mandated depend upon how you define "appropriate," to some extent?

MR. KUNTZ: To some extent.

JUDGE MANSFIELD: And who makes that determination of what the standard is? The school district, the Commissioner of Education of the State or the District Court of the United States?

MR. KUNTZ: I think appropriately -- and this goes to your question on the standards of review -- I think that it has to be the local educational authority.

* * * [41]

JUDGE TIMBERS: What was the objective of the injunction sought? You mentioned irreversible error.

[41]

MR. KUNTZ: Irreversible harm. The purpose of the injunction was to order a sign language interpreter into the class precisely at that moment.

JUDGE TIMBERS: That is not to enjoin in a conventional sense we use it? If that was a mandatory injunction --

MR. KUNTZ: Yes, it was.

JUDGE TIMBERS: There is no question about that.

MR. KUNTZ: No, there was no question with that.

I think that when the --

JUDGE TIMBERS: Do I understand that you do not dispute the right of the plaintiffs here to seek a mandatory injunction, or the power of the Court to grant it?

You say it should not have been granted.

[42]

MR. KUNTZ: I don't think that we have --

JUDGE TIMBERS: What I am getting at is there is no quarrel about the propriety of the procedure involved.

MR. KUNTZ: It is very clear under the Act. It seems to me they have the right to go to the Federal Court and I think that under the Act they have the right to ask for a mandatory injunction.

JUDGE MANSFIELD: You are using very general language. It says the Judge can grant whatever --

MR. KUNTZ: Yes, he does, and I can't say that the appropriate act --

JUDGE MANSFIELD: Whatever is --

MR. KUNTZ: The Act is a constraint in that regard. I certainly --

[42]

JUDGE MANSFIELD: Yes. That does use "appropriate."

MR. KUNTZ: I wouldn't want to argue the case on that basis. I think that the school district's arguments are better based on the arguments made in the brief that it made here, that the power was exercised improperly and inappropriately in view of the evidence.

[43]

Let me come back to the evidence because I think that is critical to the school district's determination here.

In utilizing the Judge's standards, we come up against an impossible task.

There are no present tests that I know of that would measure the short fall of a handicapped child. In fact, no test that I know of that measured

the short fall of nonhandicapped children.

Were such tests to be developed, I am not sure that we wouldn't be met by outright and rebellion on the part of the local parents to the administration of those tests on a universal basis to the children to make the kinds of determinations suggested by the Judge.

The only evidence that was available to the District Court was how Amy is performing and the intelligent quotion test that she took earlier on in her career. That test identifies Amy as in the upper range of the average bright, normal child. She's not a genius, she's not a spectacular person of spectacular intelligence. She's in the high normal range and her perform-

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ance in the classroom is exactly as you would expect somebody of that

[44]

intelligence, given the composition of her class, to achieve. She achieves in the upper middle range of the class, which is precisely where she's in terms of her I.Q. as compared to the other I.Q.s of the other 18 children.

JUDGE MANSFIELD: What is your answer to the argument which I understand the other side to make that represents, in effect, an overachievement as attributable to an awful lot of hard work, a lot of hours, a lot of school and that you are still faced with the fact that she has a major deficiency in hearing and therefore is far below the other students in the ability to hear and

[44]

understand what is going on in the courtroom -- classroom. That was a Freudian slip.

In the school room.

MR. KUNTZ: Two answers.

One, the testimony at District Court was that Mrs. Rowley spends an hour a day with Amy. I respectfully suggest that there is no more than the average parent, maybe a little bit less than the average parent spends with a normal child in that classroom.

Secondly, that classroom is designed right

[45]

from the beginning to assist Amy's understanding, and it's been the testimony of everybody who went into that classroom and who was subject to cross examination on what they saw

there that she does understand what goes on in that classroom.

She understands so well that she can respond to questions perfectly adequately, she can help other students.

She's in full participation in that class and there wasn't any evidence to the contrary at either the hearing before the independent Hearing Officer, or the hearing before the District Court.

In fact, the district's history here is remarkable history. Before Amy came to this school, the teachers there looked upon her entry to that school not as a burden, but as a challenge and a unique opportunity to give this one child everything they could in terms of what they were able to deliver.

[45]

So they organized themselves around a program designed to make Amy succeed in her classroom, and they succeeded in doing that. Their efforts were so coordinated that they had eight teachers, or I think it's maybe even more, who

[46]

went to a special sign language class in the event that they might run into Amy in the art class, in the physical ed class, in the library, so that even on the peripheral classes and instructions, they would be able to focus in on Amy. They instructed the teacher in a special way, the principal visited there daily. He testified at the hearing before the independent Hearing Officer. The teach spent -- her first grade teacher spent the entire summer before first

[46]

grade reviewing tapes on how to sign and how to communicate with a deaf child.

The school district did not adopt any philosophical approach to Amy. They said whatever works for her. And I think that is an important part of this case. They weren't opposed to a sign language interpreter. They never were. They still aren't. What they said was, "Look, let's see if a sign language interpreter works."

So in the spring of 1978, they put a sign language interpreter in her class for a two-week period as a test to see whether that would be something that would benefit Amy. At the end of that test, everybody who observed it, everybody

[47]

who had anything to do with it said

she doesn't need this service.

As a matter of fact, the service may be a distraction to her and may be a hindrance to her proper learning.

Now, the Judge in the District Court said, well, the difficulty with accepting that evidence is that Amy probably was not trained to look at the sign language interpreter. But that is a conclusion, I think, that can be readily looked at from another prospective.

If Amy, in fact, as is claimed, spent her life with the sign language as one of the services that she had as part of her upbringing, she was already attuned into sign language. The fact is that the reason she didn't look at the sign language interpreter was that she was getting everything that she needed to get and all her

[47]

understanding from looking at her classroom teacher. She also has a discreet F.M. wireless hearing aid which is very appropriate under the circumstances because what it does is it screens out sounds and allows her to hear only those sounds which the speaker is speaking into the

[48]

transmittal end of the F.M. receiver. But I think when you look at this case, what you see is that this school district did everything that was possible to do to function and to have Amy function in the classroom which forced her understanding, and they were successful.

Now, the plaintiffs come before you and say, "Let's wipe out all of that, let's try a new approach on the ground that that approach may be more suc-

[48]

cessful than the already result that you have achieved."

* * * [48]

MR. CHATOFF: May it please the Court, my name is Michael Chatoff. I am the attorney for the plaintiffs Clifford and Nancy Rowley and their infant daughter, Amy, who is deaf.

The suit was initiated under the Education For All Handicapped Children Act of 1975 and Section 504 of the Rehabilitation Act of 1973, in order to determine the question of what services Amy must receive in order to provide her an appropriate education to serve her unique needs.

[49]

Amy cannot process communicatons of hearing alone. She cannot learn to hear; no one can teach her to hear. Her parents want her to have a sign

language interpreter so that she can understand the same material that other children understand.

It is their position that if she's going to have an equal change to succeed as a student and to succeed in life, that she has to receive the same information as everyone else.

Basically, their position is that she's entitled to an even chance. Judge Broderick considered this matter and determined, by the preponderance of the evidence, that the plaintiffs had proved their relief requested. Amy is a good lip-reader, but lip-reading is a very imprecise science. Only 26% of spoken words are visible on the lips. Normal lip-reading is no more reliable than reading tea leaves.

I am considered a good lip-reader. I can't understand anything that is

[49]

going on in these proceedings using the lip-reading alone. That is why I have a note-taker and an interpreter with me. It is written all over the record that Amy

[50]

is severely deaf. In ideal situations, she misses at least 41% of what is said. This Court could not properly consider any matter before it if it missed 41% of the material presented. The appellants argued that they have complied with the state plan.

First, they think they have complied with the wrong section of the rules. They haven't even properly complied with that section, but the section that they think they must comply with is the wrong section entirely.

* * * [51]

JUDGE MANSFIELD: Why, under this statute, should the Federal Court be getting into the question of what is an appropriate education for a handicapped child when normally that is an administrative determination made by experts in education?

I think that states my question.

JUDGE BONSAL: I think I would like to add one thing to that question. Perhaps, as Mr. Chatoff stated, Amy's parents are very anxious to have this sign language interpreter in the classroom, but is that the controlling factor before the Federal Court?

MR. CHATOFF: To answer the first question, Section 1415(e) of Title 20 specifically grants Federal Court jurisdiction in questions

[52]

involving the appropriate education of handicapped children in states that receive funds under the Education For All Handicapped Children Act of 1975, and New York receives funds under that Act.

Second question:

The statute provides that services for a child must be based upon an individualized education plan and the individualized education plan is to be according to a joint effort between the school and the parents.

These statutes specifically grant the parents of the handicapped child an opportunity to try to determine how their child's handicap will be compensated for.

JUDGE MANSFIELD: I understand what you say but what is the purpose in

[52]

having an administrative review by the state if you are going to have a brand new determination of the whole question by the Federal Court?

MR. CHATOFF: That is, I think, very similar to the question of appellate review in every instance.

The statute establishes a rather detailed

[53]

administrative procedure under which perhaps 95% of all matters relating to the implementation of the 1975 Act will be resolved.

Only in the case of the remaining 5% will the matter proceed on to either State or Federal Court determining the decision of the party bringing the case to court.

JUDGE MANSFIELD: What standard did the Commissioner of Education for the

[53]

State apply in determining whether the education and the unique needs of the handicapped child here were satisfied under the Act?

THE INTERPRETER: I am sorry; I missed part of that question, your Honor.

JUDGE MANSFIELD: What standard did the Commissioner apply in determining whether the unique needs of the handicapped child here were met within the meaning of the Act?

THE INTERPRETER: Thank you.

MR. CHATOFF: I believe, although it is not clearly set out, the Commissioner determined that an appropriate education is an adequate education, an education that will enable a child to progress from one grade to the next until the child graduates

[54]

from high school. That, I believe, is the determination of the Commissioner of Education.

JUDGE MANSFIELD: Having in mind that Federal Judges are not experts in the field of education, what is your answer to the argument that a provision of a sign language interpreter might adversely affect the education of a child by diverting it from the other methods of understanding what is said, such as lip-reading and this discreet F.M. apparatus and make the child more dependent upon the interpreter than upon the type of situation that the child will be confronted with throughout his or her life?

MR. SHATOFF: I think it was made very clear in the record that the use of total communication by a deaf child

[54]

improves all communication skills.

Amy speaks more clearly than 99% of deaf children her age because of the use of total communication. Total communication provides a child with an opportunity to receive information, places information in the child's brain and stimulates a desire to learn.

I don't believe it has any detrimental effect whatsoever on interaction with hearing

[55]

people in school or later in life.

I think deaf people, better than hearing people, understand that they live in a hearing world. Deaf people will make considerable effort to make themselves understood than a hearing person. They will go well over halfway, but they cannot go all the way.

[55]

They cannot teach themselves; they cannot learn to hear.

It is important that the other person makes some adjustments for deafness as well.

* * * [56]

JUDGE MANSFIELD: Are you saying in substance that every deaf child must have a sign language interpreter in the class in order to have total communication which is part of the educational process?

MR. CHATOFF: Definitely not. Definitely not. It is my position and the position of the plaintiffs that the parents of a deaf child have the right and duty to determine how to raise their child and if the parents determine that their child shall be raised strictly by oral methods, shunning total communication entirely, then that is their right.

[56]

Parents have a very definite responsibility to determine how to raise and educate their child. I think that is clearly written into the Department of Education Organization Act.

However, on the other hand, if the parents of a deaf child think it more important that

that child understand what is [57] transpiring -- what is going on around them -- it is the parents' place.

In this case, Mr. and Mrs. Rowley determined for themselves that they would rely on total communication because they wanted to understand what was going on around them.

They made that same decision for Amy based on their own experience and based upon Mrs. Rowley's experience. She's a certified teacher of the deaf.

[57]

JUDGE TIMBERS: Can that fact alone distinguish this case or make it something other than a typical case under the statute?

Here you have a mother who is a certified teacher of the deaf. I don't know whether that means she teaches other persons than Amy, but here we have spent close to an hour or the better part of an hour here today reviewing this and I just wonder how feasible it is that this is not a test case or a class action, how feasible it is for the Federal Courts, even under this rather broad and ambiguous statute, to dissect with a minuscule comb proceedings before the state bodies. You have got proceedings before the

[58]

Hearing Examiner, the Commissioner of

Education reviewed it, now the District Court has reviewed it and I suppose after we get through you are going to go to the U.S. Supreme Court, all for the sake of Amy.

Now I am sure Amy is a very delightful person, but how many times is this Court or the Courts of the United States going to have to go through this procedure and particularly, Mr. Chatoff, in view of what you hve said repeatedly that each parent or set of parents should be permitted to make the determination as to what is the total educational program of the child, including whether or not an interpreter is needed.

I am going to withdraw the question.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
79 Civ. 2139 (VLB)

ORDER

----------x

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

----------x

VINCENT L. BRODERICK, U.S.D.J.

Plaintiffs have moved by order to show cause for the appointment of Robert Manley to retain, at the expense of defendants, a certified interpreter for the deaf to interpret for Amy Rowley during any school period in which academic subjects are taught.

A conference was held with respect to this application. The defendant Hendrick Hudson Central School District represented, through its attorneys, that it was making, and would continue to make, every effort to identify and retain a qualified sign language interpreter for Amy Rowley, and that it had enlisted the good offices of Robert Manley to assist it in this endeavor. Both defendants represented that there is no provision in New York State for certifying "interpreters for the deaf."

It has further been represented that although the responsibili8ty for selection and appointment is that of the school district, Amy's parents will be consulted. The defendant Commissioner of Education has

independently represented that it will render to the school district every possible assistance.

In my judgment the defendant school district can be relied upon to discharge in good faith its responsibilites. I have had occasion before, in a different context, to note this (483 F.Supp. 528, 530, 531 (1980)).

In light of the representations made, I deny without prejudice plaintiff's motion to appoint Mr. Manley to retain an interpreter for the deaf. I also deny plaintiff's application, brought on by the same order to show cause, to find defendants in contempt.

SO ORDERED.

Vincent L. Broderick, U.S.D.J.

Date: New York, New York
September 23, 1980